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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970 368

CARMINE PERSICO, JR., SALVATORE ALBANESE and RALPH SPERO,

Petitioners,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Carmine Persico, Jr., Salvatore Albanese and Ralph Spero; Petitioners, jointly pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 15, 1970.*

Opinions Below

The opinion of the Court of Appeals affirming petitioners' judgments of criminal conviction—the matter here sought to be reviewed—is not yet reported; it is printed as an appendix hereto, *infra*. A proposed Memorandum and Order of United States District Judge John F. Dooling, Jr. (E.D.N.Y.), dated October 11, 1968, not reported, is printed

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* This joint petition is companion with the separate petition of Hugh McIntosh (v. U.S.A.).

as an appendix hereto. A Memorandum and Order of United States District Judge Jack B. Weinstein (E.D. N.Y.), dated December 13, 1967, not reported, is printed as an appendix hereto, *infra*. Another opinion of the Court of Appeals, in a connected mandamus proceeding, reported in 406 F. 2d 192, decided January 21, 1969, is printed as an appendix hereto. There are also two earlier opinions by the Court of Appeals, reversing prior convictions of these same petitioners under the same indictment, reported respectively in 305 F. 2d 534 and 349 F. 2d 6.

Jurisdiction

The judgment of the Court of Appeals affirming the within judgments of conviction (and affirming an order of District Judge Weinstein which denied motions to dismiss the indictment) was entered on April 15, 1970. A timely joint petition for rehearing was denied by the Court of Appeals on May 8, 1970, and timely suggestion that the appeal be reheard in banc was denied by the Court of Appeals on May 19, 1970. By order of Mr. Justice Harlan the time for filing a petition or petitions for certiorari in this case has been extended to and including July 7, 1970. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented

In April 1960 petitioners were federally indicted for hi-jacking a truck. They have now been tried five times. The first trial (1961) ended in a jury disagreement. The second trial (1961) resulted in convictions which the Court of Appeals reversed for misconduct by the Trial Judge and the prosecutor. The third trial (1963) ended in partial mistrial and partial jury disagreement. The fourth trial

(1964) resulted in convictions which, again, the Court of Appeals reversed for judicial and prosecutorial misconduct. The fifth and latest trial has resulted in convictions which the Court of Appeals has affirmed and as to which we here seek certiorari.

After the jury verdict of conviction in this fifth trial, the Trial Judge (Dooling, J.) issued a proposed Memorandum and Order for dismissal of the indictment on grounds of the over-all unconstitutional oppressiveness of the five-trials history and the "merely marginal fairness" of the fifth trial. The Government obtained in the Court of Appeals a writ of mandamus commanding Judge Dooling to impose sentences on the jury verdict. Thereafter Judge Dooling denied renewed defense motions for a new trial or for judgment notwithstanding the verdict, and he sentenced the defendants. The Court of Appeals affirmed. The questions are:

1. Does the five-trials, ten-years history of this case, climaxed by the "merely marginal fairness" of the fifth trial, require this Court's intercession to preserve the proper administration of federal criminal justice and constitutional standards of fair trial?

2. Was this fifth trial in actuality even less than one of "merely marginal fairness", and did it instead fall below *minimum* standards of constitutional fairness, owing to prosecutorial misconduct in resorting to secret, ex parte procedures to surprise the defense by bringing into the case for the first time, mid-trial, the notorious "Cosa Nostra" informer-witness, Joseph Valachi? Was the defense thereby deprived of fair opportunity to select a fair and impartial jury, or to move for proper safeguards

against jury exposure to the inevitably sensational Valachi publicity, or to seek other proper protections against such calamitous ambushing tactics by a prosecutor?

3. Did the prosecutorial misconduct go beyond improper surprise of the defense, and did it include also a deception against the Trial Judge which this Court should scrutinize, in that special Washington attorneys of the Department of Justice assigned to this fifth trial presented to the Trial Judge an ex parte affidavit (for the secret summoning of Joseph Valachi as a witness) purporting to have been dictated by "JPH", which are the same initials as those of Joseph P. Hoey, the then United States Attorney for the Eastern District of New York, whereas the record establishes (on the word of those same Washington attorneys) that Mr. Hoey's office knew nothing about this secret affidavit at the time in question?

4. Were petitioners denied the constitutional right to a speedy trial through substantial incidences of prejudicial disadvantage attributable to the four years delay between the fourth and fifth trials and the duration of the entire prosecution since 1960?

5. Especially in view of this Court's decision in *United States v. Sisson*, No. 305, Oct. Term 1969, decided June 29, 1970, 38 U.S. Law Week 4616, do District Judge Dooling's judicial acts in connection with his proposed memorandum and order of October 11, 1968 require either a determination that Judge Dooling bindingly rendered an unappealable verdict of acquittal notwithstanding the jury verdict, or that the case should be remanded to afford Judge Dooling a further opportunity to honor his announced judicial intention of relieving petitioners of further jeopardy? Does

the denial of certiorari in the companion mandamus proceeding, *United States* v. *Dooling*, 406 F. 2d 192 (C.A. 2, 1969), cert. denied, 395 U.S. 911, stand in the way of granting such relief to petitioners at this time?

6. Were petitioners deprived of the constitutional protections enunciated in *Bruton* v. *United States*, 391 U.S. 123?

7. Were petitioners denied a fair due process trial through improper reception in evidence of testimony concerning other crimes?

8. Was the evidence insufficient for conviction, and did the Court of Appeals err in deeming that the sufficiency of the evidence was not being challenged?

9. Petitioners adopt the Questions Presented in the companion petition in *Hugh McIntosh* v. *United States*, No. , October Term 1970.

Constitutional and Statutory Provisions Involved

The case involves the robbery provisions of the Hobbs Act 18 U.S.C. § 1951, under which the charges of hi-jacking were brought in the 1960 indictment.* The case also involves the Fifth (due process, speedy trial), Sixth (confrontation and right of counsel) and Eighth (cruel and unusual punishment) Amendments of the United States Constitution.

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* No issue is presented here that is dependent on this statutory text.

Statement of the Case

In April 1960 petitioners were indicted in the Eastern District of New York on Hobbs Act charges of hi-jacking (in July 1959) a truck of the Akers Motor Lines Terminal in Brooklyn containing piecegoods. The indictment contained several counts as to other matters not here pertinent. Involved here are one conspiracy and one substantive count as to the single hi-jacking just mentioned. Several other persons were indicted along with petitioners, including Gasper Vaccaro, who pleaded guilty and has been the accusing witness in all of the trials; Hugh McIntosh, co-petitioner in a separate companion petition for certiorari herein; and George LaFante, who was acquitted. None of the other indicted persons are of concern for present purposes, except Joseph Magnasco, whose fatal shooting some years ago has occasionally prompted the Government's lawyers, over the years, to try to deprive the petitioners of bail.

As noted, this case has been tried five times on the Akers hi-jacking charge. The first trial, in May 1961, before Judge Mishler and a jury, ended in a jury disagreement.* The second trial, in June 1961 before Judge Abruzzo and a jury, resulted in convictions of the present petitioners, which were reversed by the United States Court of Appeals for the Second Circuit on grounds of egregious misconduct by both the Trial Judge and the prosecutor (*United States*

* In a sense there have been six, not five, trials under this indictment, as in March 1961 there was a trial before Judge Byars which resulted in a directed verdict of acquittal, on certain other counts.

v. *Persico*, 305 F. 2d 534 (C.A. 2, 1962)).* The third trial, in early 1963, before Judge Bruchhausen and a jury, resulted in a mistrial as to Petitioners Persico, Albanese and Spero when Persico was wounded by gunshot on a Brooklyn street; the co-defendants McIntosh and LaFante elected to continue on trial, and the trial ended in a jury disagreement as to them. The fourth trial, which lasted some four months in early 1964, before Judge Rosling and a jury, resulted in convictions of all the present petitioners, the companion petitioner McIntosh, and the co-defendant LaFante; however, once again, the Court of Appeals reversed these 1964 convictions for misconduct of the Trial Judge in having practically tried to force a conviction (*United States* v. *Persico*, 349 F. 2d 6 (C.A. 2, 1965)).** The instant fifth trial, before Judge Dooling, resulted in a jury verdict of conviction, followed by certain unusual post-trial and appeal proceedings described *infra*, and, finally, by judgments of conviction that were (very reluctantly) entered by Judge Dooling under mandamus from the Court of Appeals (*United States* v. *Dooling*, 406 F. 2d 192 (C.A. 2, 1969), *cert. denied*, 395 U.S. 911), which has now affirmed the latter judgments.

The prosecutive intemperateness that has so long plagued this case has continued into this fifth trial, as will appear.

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* The overzeal and implacability of the prosecutive personnel in this extraordinary case seem to have generated, repeatedly, "reversible error" and a failure of judiciality at the trial judge level.

** This misconduct of the Trial Judge in the 1964 trial was shown to have been in large part a symbiotic, unjudicial interplay with the same ferocious prosecutor whom the Court of Appeals had reprimanded in its opinion reversing the 1961 convictions (305 F. 2d 534); see the Brief for Appellant Carmine Persico, Jr. in Docket No. 29271 in the Court below in the 1964 appeal (349 F. 2d 6).

In all five trials the Government's case depended dispositively on the above mentioned accomplice witness Gasper Vaccaro; and so, throughout, the question for everyone has been whether juries will believe that Vaccaro is telling the truth. Two juries, as seen (in 1961 and 1963), could not agree on believing Vaccaro. Three juries have apparently believed him, but as to two of those three juries' belief of Vaccaro the Court of Appeals evidently concluded that such belief was not so overwhelmingly justified as to allow appellate condonation of the jury-influencing prejudicial overzeal of the respective prosecutors and Trial Judges (the second and fourth trials).

From the outset, the Government's theory of this case *qua* Vaccaro has been, in brief, that petitioner Persico directed a group of the defendants (including Vaccaro) on the night of July 27-28, 1959 in planning and carrying out the Akers hi-jacking in Brooklyn; that Vaccaro's role was to "spot" a piecegoods truck being loaded at the Akers terminal; that the others were variously to carry out the hi-jacking and sequester and dispose of the loot; and that all of this was accomplished. Vaccaro all along has been the only witness ostensibly in a position to give direct inculpative evidence against his co-defendants.

In the first three trials the question of Vaccaro's *general* credibility was the dominant question, and, as seen, two of those first three juries were unable to agree on believing Vaccaro. For details of this problem of Vaccaro's general credibility in the first three trials, see, *e.g.*, the Brief for Defendant-Appellant Persico, pp. 6-9, in the 1962 appeal in the Court of Appeals, Docket No. 27298, where that Court reversed the convictions at the second trial, commenting,

"The worse his [Vaccaro's] history the more likely that extremely heavy sentences were facing him and the more he needed help from the prosecution in this case" (305 F. 2d at 538).

The fourth trial brought to light a more specific flaw in Vaccaro's credibility, namely, *specific* confirmation that he was fabricating his entire story, as his description of the indispensable physical locale of his alleged observational activities in "spotting" an Akers piecegoods truck on the night in question emerged as practically being incredible as a matter of law in view of other testimony by disinterested witnesses, including the Akers truck driver himself, Kennedy, *a Government witness*. For, Vaccaro swore that all of his "spotting" activities took place on the *Nevins Street* side of the Akers terminal, while Kennedy and other disinterested witnesses were positive that the truck in question was not and could not have been on the Nevins Street side at any time that night but had to be on the *Union Street* side; and it was agreed in that fourth trial, by both sides and by the Court, that if Vaccaro was lying on this "Nevins Street-Union Street" question the defendants must be acquitted. See the printed Brief for Appellant Carmine Persico, Jr. in the appeal from the fourth trial, Docket No. 29271, at pp. 21-28, judgments of conviction reversed, 349 F. 2d 6. Those fourth trial convictions were reversed on the main ground that the Trial Judge had prejudicially intruded himself into the jurors' decision on the all-important Vaccaro-credibility issue of "Nevins Street *versus* Union Street" (*ibid.*). And the Court of Appeals opinion on the reversal of those fourth trial convictions noted the language in its earlier opinion (which had reversed the second trial convictions—305 F. 2d at 536-

537) disparaging Vaccaro's testimony as that of a person "who had the strongest possible reason to become a Government witness", to which the Court added (in the opinion on the fourth trial reversal), "* * * these observations are apt in reviewing * * * this fourth trial" (349 F. 2d at 7-8).

The present petitioners had urged in the appeal from the fourth trial that this prosecution should be terminated at last, on grounds of due process oppressiveness akin to double jeopardy, but the Court of Appeals in a footnote (349 F. 2d at 7, fn. 2) referred to *Krulewitch* v. *United States*, 336 U.S. 440, where this Court reversed and remanded for a new trial a case which has already been tried four times; and our case was remanded by the Court of Appeals for a new (fifth) trial (*id.*, at 13)*.

The Court of Appeals' remand for a fifth trial was in July 1965 (349 F. 2d 6). The present (fifth) trial did not commence until April 1, 1968.** In the preceding year petitioners had moved severally to dismiss the indictment on grounds of denial of speedy trial plus cruelty and oppressiveness; see the various 1967 papers on this subject which were filed in the District Court and which appear in the certified record herein as items numbered 17, 21, 22, 23, 25, 27, 28, 30, 31, 32, 34.*** On December 13, 1967 District Judge

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* It is correct that such was this Court's dispositton in *Krulewitch*, *supra*, but the Court made the disposition without discussion.

** We concede that entire responsibility for this delay between the fourth and fifth trials is not the Government's alone; but we believe this question of responsibility is not important in the true issue-framework of the fairness of the over-all prosecutive ordeal to which petitioners have been subjected since 1960 (see our Reasons, *infra*).

*** The above arabic numbers appear in the lower right hand corner of each of the above record items; in the "Index to Record on Appeal" roman numerals are used for these same items.

Weinstein denied all of the foregoing defense motions to dismiss the indictment, with leave to renew at the fifth trial (Judge Weinstein's memorandum and order is printed as an appendix hereto, *infra*). Judge Weinstein's reasoning was that, as to the issue of speedy trial, blame for the delay between the fourth and fifth trials "is not clearly assessible" (*ibid.*); and that "No suggestion is made that since July, 1965, any loss of witnesses or any change in available evidence has made the trial more difficult. If, on the retrial of the case, it should appear that there was such prejudice, the defendants may renew their motion." (*ibid.*). As to the defense claim of cruelty and oppressiveness in allowing repeated trials, Judge Weinstein merely rested on the Court of Appeals' 1965 order of remand, without further independent discussion of the merits of this question.*

We turn now to the pertinent sequences and happenings of the instant fifth trial, where there are six basic issue-categories that are pertinent for the purposes of this petition for certiorari, namely, (1) Vaccaro's credibility (as before) on the absolutely decisive evidence-sufficiency issue of Nevins Street *versus* Union Street;** (2) prosecutorial

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* As will appear, this eschewal by Judge Weinstein of independent determination of the cruelty-oppressiveness question turned out later to have lodged in this case a decisional theme which has persisted down to the present moment. Strange though it be, none of the Courts below have yet come to grips with this question of cruelty and oppressiveness in subjecting petitioners to all of the repeated trials. This is a gap in the decisional history of this case to which we are asking this Court now to give its attention (*infra*).

** Since this Court's decision in *In re Winship*, No. 778, Oct. Term 1969, decided March 31, 1970, U.S. , 25 L. Ed. 2d 368, rooting the rule of reasonable doubt in the due process clause, there may have become available in proper cases opportunity for more liberal appellate review of issues of sufficiency

misconduct regarding the Joseph Valachi testimony; (3) the resultant prejudicial publicity; (4) the question of whether the special Washington prosecutors deceived Judge Dooling (of the Eastern District) by falsely making it appear that they had the approval of United States Attorney Joseph P. Hoey of the Eastern District in using secret tactics to spring Joseph Valachi on the defense as a surprise witness; (5) the question of the fifth trial's impact on the net cruelty and oppressiveness of this five-trials prosecution; and (6) the *Bruton* questions arising from Valachi's testimony of alleged inculpatory admissions by some of the petitioners.

As to these details of the fifth trial record, the first thing to note is that the Union Street-Nevins Street proofs were even worse for the Government than in the fourth trial which resulted in the 1965 reversal. Vaccaro, again in this fifth trial as before, swore the truck was on the Nevins Street side (Tr. 1076-8, 1080-1, 1084-6, 1089, 1109-11, 1113-15, 1131-42, 1144-6, 1189-94, 1203, 1472-80). But also, again, he was unambiguously contradicted by the truck driver himself, Kennedy, who swore the truck was on the Union Street side (Tr. 3335-3337). Also, the Akers terminal manager, Gehring, who in the fourth trial had given very "lightweight" and severely impeached testimony that the truck was on Nevins Street (see the Persico brief in no. 29271, op. cit. *supra*, at pp. 26-27), now in this fifth trial

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of evidence in criminal cases. In any event, the Vaccaro-Nevins Street-Union Street evidence question in our case bears on the certiorari issue of subjecting petitioners to five trials when the prosecution's whole case gives such distressing indications of being based on the word of a man "who had the strongest possible reason to become a Government witness" (the Court of Appeals' characterization of Vaccaro at 305 F. 2d 536-537, *supra*).

could not remember at all where the truck was located, and was permitted, over strenuous defense objections, to be salvaged as a prosecution "witness" on this all-important point by Judge Dooling's letting the prosecutor read to the jury Gehring's fourth-trial testimony on the ground of "lapse of memory".* For the entirety of Gehring's relevant testimony in this fifth trial see Tr. 3700-3796, 3814-3864.

But the probative development in this fifth trial which above all made the Union Street-Nevins Street proofs even worse for the Government this time than in the fourth trial, was that the defense this time had at last been able to locate the Akers truck dispatcher, Patrick Joseph Maloney, who was the one man in the best (and in the only) position really to know, *as a disinterested witness*, the answer to the literally fatal (for both sides in this case) question of Union Street *versus* Nevins Street. The witness Maloney unequivocally swore—unshaken by a ferocious cross examination of the surprised prosecutor—that the truck in question was on the Union Street side, that it could not have been moved from Union Street to Nevins Street except on orders to him personally, that he received no such orders, and that indeed the giving of such an order would have been unprecedented and had never occurred in his experience with regard to any like situation at the Akers terminal. The entirety of Maloney's testimony appears in this fifth trial transcript at 4038-4091.

Lest there be any doubt in anyone's mind that—as conceded by all concerned in the fourth trial (*supra*)—the

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* See our fifth trial contentions concerning this at Tr. 3700-3796, 3814-3864, *passim*.

within convictions cannot be rationally supported if the truck was on the Union Street rather on the Nevins Street side of the Akers terminal, we ask the Court to look at the prosecutor's summation in this fifth trial, at Tr. 4473, where Mr. Woerheide told the jury, referring to defense counsel's argument that Vaccaro could not physically possibly have carried out his claimed preparatory hi jack observations if the truck was on the Union Street side:—

"And I adopt that—to see them loading those trucks you have to get down to the Nevins Street side. * * * So if you are going to do a hi jacking and you send a man down there to spot a load, the place to spot a load is on the Nevins Street side. * * *"

During its deliberations in this fifth trial the jury asked for only two things, one of which was the entirety of the photographic exhibits relating to the Union-Nevins scene (Tr. 4541). But petitioners in this fifth trial never really had a chance for an objective jury decision on this Union-Nevins question and Vaccaro's believability on the subject, because our chance for this was destroyed by the introduction of the inflammatory Joseph Valachi circumstances into this fifth trial.*

These Joseph Valachi circumstances at the fifth trial will now be described (certain apparently unconnected prelimin-

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* Just as our chance on this jury issue had been destroyed by the prejudicial interferences of Judge Rosling in the fourth trial, reversed by the Court of Appeals mainly on that ground (*supra*).

As to the question of whether we have preserved for certiorari consideration the fifth trial issue of sufficiency of the evidence on the Union-Nevins point, see, in the appendices hereto *infra*, our Joint Petition For Rehearing in the Court below. That petition for rehearing was considered and denied on the merits by the Court below.

aries which now follow will be seen in due course to be connected):—

In a pretrial session before Judge Bartels on January 2, 1968 United States Attorney Hoey told the Court, referring to the special Washington prosecutors Messrs. Woerheide and Ornstein, "They have worked with the witnesses since May [1969], and we are ready to proceed with the trial" (Tr. Jan. 2, 1968, p. 7). When the case was called for trial on April 1, 1968 defense counsel informed Judge Dooling that in the pretrial proceedings before Judge Weinstein in 1967—on the defense pretrial motions to dismiss the indictment, *supra*—"The Government told Judge Weinstein that they sat in Washington in solemn enclave for seven or eight months deciding whether to prosecute" (Tr. 15*).

A little farther on in the opening day proceedings of April 1, 1968 defense counsel brought up the subject of disclosure under *Brady* v. *Maryland*, 373 U.S. 83 (Tr. 80-84), and Mr. Woerheide replied (Tr. 82-83):

> "Mr. Woerheide: Your Honor, if there is ever a case in which the defendants have had pretrial discovery of all the Government's evidence, it is this particular case, and the evidence is right over there (indicating), your Honor.
>
> * * * * *
>
> "The inculpatory evidence has been produced at least four times in this Court, and the 3500 material that goes with the inculpatory material that came out on direct examination has been used time after time in the cross-examination of the defendants, and it is all laid out in the record that is in the book rack over there right now."

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* The reference "Tr. " without other designation refers to the fifth trial stenographic transcript.

The above theme—that the Government did not need to supply the defense with discovery material or 3500 material because we already knew all about it and there was not going to be anything new in this fifth trial—was reiterated time after time by Mr. Woerheide at the April 1, 1968 session—see the colloquies *passim* at Tr. 69-73 (e.g., by Mr. Woerheide at Tr. 71-72: "*** after these four previous trials of this matter, there are no surprises in the 3500 material"); Tr. 80-94; Tr. 99; Tr. 107-115—we specially invite attention, in the foregoing colloquies, to Mr. Woerheide's repeated play on the idea that the only problem was whether the Government would again call all or only some of the prior trial witnesses, there being no suggestion whatever that the Government would be calling any new witnesses, much less any new witness of the prodigious impact of a Joseph Valachi type; and see also how, throughout these last cited colloquies, both the Court and defense counsel so understood Mr. Woerheide's meaning as we have just described it.

The second trial day in this fifth trial was April 3, 1968, when selection of a jury began. The topic naturally came up of asking the prospective jurors about their acquaintance with prospective witnesses. See the colloquy at Tr. 222-236, in which the Government supplied the Court and defense counsel with a list of the witnesses called at the fourth trial, and in which everyone was assuming that this would cover the matter for purposes of interrogating prospective jurors. Indeed, at Tr. 248 the Court stated to one group of prospective jurors:

> "Now, the prospective witnesses include the following, and this is not a warranty that you will hear every one of these people, and it is not a warranty that there may not be other witnesses, *but so far as*

> *counsel can tell in this case, these are the people who you may well hear as witnesses.*" (Emphasis supplied)

Later that same day (April 3, 1968), in a colloquy about jury challenges, the Court told the prosecutor, "Now, Mr. Woerheide, this case can't be tried again. It is—if it is not disposed of this time, that is the end of it", to which Mr. Woerheide replied "I understand that" (Tr. 325-326). The Court then further emphasized its sense that both Court and Government were under an obligation in this fifth trial to afford to defendants a kind of maximum fairness, the Court saying (Tr. 326):

> "I think we are all under the constraint of going beyond what common right and common justice would normally call for.
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> * * * * * *
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> "* * * the fact that it is a fifth trial or sixth trial, is onerous in the extreme."

(We pause to note the contrast between the above quoted idea of the need for maximum fairness in this fifth trial and Judge Dooling's own later evaluation of this trial as having involved "merely marginal fairness".)

The next pertinent development came at the end of the following trial day, April 4, 1968, after the jury had been selected and sworn and Court adjourned until the next morning for the commencement of the taking of the trial testimony. This next development was the Government's secret visit to Judge Dooling in his chambers to get the writ signed for the secret summoning of Joseph Valachi as a witness in this trial. The pertinent documents in the record are those numbered 47, 48, 49 and 62 (Roman numbered in

the "Index to Record on Appeal"). Items 47, 48 and 49 consist of the "Petition For Issuance And Sealing Of Writ Of Habeas Corpus And Testificandum", the writ itself, and Judge Dooling's order to seal these papers and an "attached affidavit". These papers are dated April 4, 1968, and are stamped "Filed in Clerk's Office" April 24, 1968.* The most interesting item, however, in this secret Valachi writ situation on April 4, 1968 is the supporting affidavit of Messrs. Woerheide and Ornstein, sworn to April 4, 1968 (item numbered 62 in the Record on Appeal). This affidavit, which paints a horrifying picture of the danger of Valachi's being assassinated "by underworld figures" (the affidavit does not mention anyone connected with this case, except of course in the caption of the affidavit), bears in the usual place in the upper left hand corner the typewritten initials of the person or persons who authored and typed the paper, "JPH:RMO:rbe". The initials "JPH" stand for Joseph P. Hoey, the then United States Attorney for the Eastern District of New York. One would take it, therefore, that Mr. Hoey either authored this affidavit, or authorized "RMO" to author it, "RMO" presumably being the young Washington prosecutive assistant Robert M. Ornstein who was Mr. Woerheide's associate. The one thing one would not anticipate in such a situation is that "RMO" would use the imprimatur "JPH" if this document were being done by "RMO" with deliberate secrecy to prevent "JPH" from knowing about it. But, according to the record, this latter

* Interestingly also, as indicating the Government's highhandedness in this matter, the writ is further stamped "received U.S. Marshal" as of 9:44 A.M., April 4, 1968—that is, the Government had apparently given the writ to the Marshal early in the morning of April 4 before even getting Judge Dooling's signature, which was not obtained until the end of that day.

is exactly what happened. For, at Tr. 3564 and 3578-3580 Messrs. Woerheide and Ornstein told Judge Dooling, referring to the secret obtaining of the writ on April 4, 1968 that "* * * the office of the United States Attorney was not informed until Mr. Valachi appeared in Court" [which was April 16-17, 1968] (Tr. 3564); and see Tr. 3578-3579 where Mr. Woerheide told the Court:

> "Your Honor, I spoke to no one in this building or having anything to do with this case or with the operation of the office—the office in this building, and that includes the United States Attorney's office, the Clerk of the Court office, and the United States Marshal's office concerning this matter. And it was handled on a need to know basis.
>
> "The only person who had any information about it whatsoever were the girl who typed up the petition that was submitted to your Honor, and my superiors in the Department, and members in agencies such as the Bureau of Prisons, the FBI who would have some need to know concerning this matter."

At Tr. 3580 Mr. Ornstein, referring to the above remarks of Mr. Woerheide, told Judge Dooling, "Your Honor, I adopt fully what Mr. Woerheide has stated".

And when, in the same colloquy from which the above is quoted, defense counsel pressed Mr. Woerheide as to how the massive publicity (*infra*) concerning Valachi's supposedly secretly-scheduled appearance here had come about, Mr. Woerheide said, "Your Honor, we are making an investigation to find out" (Tr. 3578). This latter was the last that has ever been heard in this case of Mr. Woerheide's promised "investigation to find out".

Incidentally, the above-mentioned secret affidavit in support of the Valachi writ of April 4, 1968 did not achieve "filed" status in the District Court Clerk's Office until September 20, 1968 (item 62 in the Record on Appeal).

We have above departed from our chronological description of the fifth trial record—in order to bring out in one place all of the related facts about the secret Valachi writ of April 4, 1968 and the apparently unauthorized use of United States Attorney Hoey's "Eastern District" imprimatur in inducing Judge Dooling of the Eastern District to help the Government at that juncture. Returning now to our chronological recitals:—

On April 8, 1968, immediately preceding Vaccaro's testimony Judge Dooling announced (Tr. 1005):

> "I would ask counsel if in every case in which it is expected that a witness will be called who for some reason or other is not on this list [the Government's list of fourth-trial witnesses] that before his name is called out in the courtroom, we tell one another who the witness is going to be, so that if there is going to be any request for a possible postponement of that witness' testimony, so that somebody else can be brought in to listen to him or something of that sort, or any other objection to the introduction of that witness' testimony we will have the chance to review it together in the absence of the jury.
> "Is that agreed?"

On April 15, 1968, as Vaccaro's testimony was nearing completion, the following took place (Tr. 1858-1859):—

> "Mr. Edelbaum: We might be through with Mr. Vaccaro tomorrow.

Mr. Woerheide: I wonder whether we can be through with him tomorrow morning.

Mr. Edelbaum: It could be.

Mr. Rosner: Would it be possible for us to have the 3500 material for the next witness that the Government intends to call?

Mr. Edelbaum: Will you tell us who the next witness is going to be, Mr. Woerheide, because we have some housekeeping work to do, gathering minutes of the prior trials—.

Mr. Woerheide: All I can say is our plans are in a state of flux at this time.

I can't tell you who the next one is right now.

Mr. Edelbaum: Will you tell us tomorrow morning?

Mr. Woerheide: I just discovered that one of our witnesses is in the West Indies in the balmy sunshine.

Mr. Edelbaum: Gee, that's nice. Let's adjourn the trial.

Mr. Rosner: We will be happy to go down there and take his deposition.

The Court: Well, I think you really ought to make an effort to let counsel know who the next witness is."

Mr. Woerheide ignored Judge Dooling's above last-quoted remarks. But it is evident that Mr. Woerheide's ignoring of this was far from accidental. For, the very next day, April 16, 1968 Mr. Woerheide suddenly revealed that he must have known perfectly well on the preceding day exactly who his next witness was going to be, and that his witness plans had very little to do with his lulling jest of the day before (quoted *supra*) about "witnesses * * * in the West Indies in the balmy sunshine", as it now suddenly emerged (on April 16) that this next witness was going to be Joseph Valachi. At Tr. 2093 (April 16) Vaccaro's testimony had been concluded. At that moment, as shown in the record at Tr. 2111, Mr. Woerheide walked over to

defense counsel Edelbaum and said "* * * the Judge asked me to tell you if I have any new witnesses. I am going to call Joe Valachi" (Tr. 2111). Mr. Edelbaum thought that Mr. Woerheide was joking (Tr. 2094, 2111). The other defense counsel were taken totally by surprise (Tr. 2094-2095). As may be imagined, there then followed an extremely animated and protracted colloquy over this Bombshell development. See, *passim*, Tr. 2094-2274, where defense counsel pointed out the constitutionally offensive impingements of the Government's conduct in having thus deprived the defense of any opportunity to conduct a proper jury selection, or to seek safeguards against jury exposure to the inevitable inflammatory publicity (*infra*) of the Valachi Bombshell; and defense counsel recorded their protests at the Government's misconduct in having lulled everyone and in having defied Judge Dooling's admonitions against just this sort of ambushing tactics by the prosecution. Some of Judge Dooling's own remarks in the course of these latter colloquies will be quoted, from the proceedings of the next day, April 17, 1968, when the sensational Valachi publicity (*infra*) had hit the New York metropolitan press, T.V. and radio media. Thus, replying to an apologia by Mr. Woerheide that he "did everything that I could to avoid" prejudice to the defense (Tr. 2255), Judge Dooling stated (Tr. 2255-2256):

> "The Court: No. I would think I cannot agree to that, and I think that you and I must both deal squarely with what the defendants say about the failure to have selected a Jury which was susceptible of being sequestered and having then sequestered them and not for the reasons set forth in the affidavit, which in my mind were inadequate as I have held; but on this ground, for I draw your attention to the

> fact that I told you that, and defense counsel, that no witness was to be called whose name had not been read to the Jurors without opposing counsel being advised because—Well, I confess, I did not know quite how near Mr. Valachi's statements had come to one or more of the defendants in this case.
>
> I knew quite enough from public discussion to know that nothing except the direst need on the part of the Government could furnish any conceivable justification for calling him as a witness in the fifth trial of a case to testify to something which it turns out was said seven years ago or more.
>
> So I think you must deal with that and I certainly would recognize that, perhaps, I was a great deal uninsightful than I should have been with this situation, a great deal less suspicious than I should have been."

To similar effect, Judge Dooling stated at Tr. 2265-2266;

> "The Court: Well, that is what I mean, I had very little insight, not enough at that point to insist upon disclosure to the defendants and to discharge that Jury and go into the whole business all over again and be in possession of a situation in which defense could have moved for sequestration or joined in the Government's motion for sequestration.
>
> "It was probably a foolish and short sighted decision on my part to proceed as I did."

That a thwarting of the defendants' constitutional rights to a fair and impartial jury was indeed accomplished *via* the inevitable publicity fanfare of the Joseph Valachi-Cosa Nostra sensation which the Government had thus booby-trapped into this case, became evident at once—indeed irreparable publicity prejudice lodged even before Valachi took the stand; indeed further, the publicity avalanche was under way even

before Mr. Wochcide had walked over to defense counsel Edelbaum in court on the afternoon of April 16, 1968 (*supra*) to advise him that Joe Valachi would be the Government's next witness. For, as defense counsel informed Judge Dooling at Tr. 2209-2210 (April 16, 1968):

> "Mr. Edelbaum: Your Honor, I might say something else, which is quite disturbing to me, which I think I ought to call to your Honor's attention.
>
> Outside of Mr. Anderson who is a reporter on the New York Times who has been here spasmodically during this trial, this trial was conspicuous by the absense of other newspaper reporters.
>
> Strange as it may seem today, of all the days, for some reason, we have a plentitude of reporters here in the Courtroom.
>
> In addition, I am just informed by Mr. Feitel, who is an associate of mine and— that this morning in the New York City Criminal Court where he appeared on an assignment, a reporter for the New York Daily News said to Mr. Feitel "Oh, is your boss in for a surprise. The Government is going to call a witness that's going to knock him off his seat," or some words to that effect. He wanted to know—she said "I'm not at liberty to disclose."
>
> Now, it's strange, very strange that counsel should have been—
>
> Mr. Kasanof: The last to know.
>
> Mr. Edelbaum: —the last to know.
>
> Mr. Rosner: I add to that, your Honor, that this afternoon as I left for lunch in the company of three of the defendants for the first time at this trial or any of the prior proceedings, there were newspaper photographers who took our picture as we left for lunch this afternoon and there were some jurors present who observed this or may well have observed this and might feel that in itself may have harmed—"

The next day (April 17, 1968) only a blind-deaf-mute locked away from all human contact in a vault could have failed to know that the theretofore wholly obscure little hi-jacking case at the Brooklyn Federal Courthouse had turned out to be a Cosa Nostra cause celèbre thanks to the participation of Joe Valachi as a surprise government witness. Here again, it is impossible in the space confines of this petition for certiorari, to do more than cite the pertinent record references concerning this Valachi publicity. See Tr. 2216-2296 and Court exhibits 2 to 7, as to the publicity of April 16-17, 1968; see also, as to the continuing publicity on subsequent days, Tr. 2627-2634, 2643-2645, 2647, 2836-2837.

As to the content of this inflammatory publicity, see the last cited Court exhibits, and the illustration quoted in the opinion of the Court below (Appendix hereto, infra, pp. A6-A8).

In a word, the defendants were depicted as a first-rank and front-line squad of the top Brooklyn Cosa Nostra Mob, engaged in internecine mass murders and whatnot.

As to the impact of this inflammatory publicity on the trial jurors in this case, the record is exactly as one would expect from the above. Every single juror—when interrogated by Judge Dooling—freely admitted exposure to the publicity of April 16-17, 1968, although most of them (as was also to be expected*) represented to Judge Dooling that their fairness was undiminished by their exposure to the publicity. Judge Dooling's interrogation of the jurors on the publicity question appears at Tr. 2296-2378, 2381-2408. All of them told the

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* What human-juror flesh could resist the temptation of staying on a jury that was about to relish the coming-to-life of a juror's once-in-a-lifetime dream of sitting in a jury box in a courtroom thrillingly dominated by the presence of a Joe Valachi regaling the Whole World from his witness seat.

Judge they had seen the newspapers, or had audited the T.V. or radio programs in question. All or nearly all of them came to the jury room on the morning of April 17 carrying newspapers which contained the Valachi stories. Most of them admitted hearing some discussion about this publicity right in the jury room, although they also spoke minimizingly about the significance of these discussions.

It is especially interesting that the only two jurors who admitted to Judge Dooling that they might not be entirely sure about the impact of the publicity on their own continuing attitude of judicial fairness were the *two alternate jurors*, Mrs. Singer and Mr. Petrocelli who had the least to lose from being discharged, as they were not sure anyhow of staying on for the duration. See Tr. 2390-2392, where Mrs. Singer was "not sure", and Tr. 2397 where Mr. Petrocelli found it "hard to say" as to their respective abilities to continue to be fair. Later, when an alternate was needed to replace a discharged juror, Judge Dooling politely rejected the alternate Mrs. Singer ("not sure") and elevated the alternate Mr. Petrocelli ("hard to say"). See Tr. 3989-3991.

After Judge Dooling's above cited interrogation of the jurors as to the publicity impact, defense counsel protested that it was impossible to conclude that the jurors were quite so superhumanly unaffected by the publicity as they (except for the more ingenue or less "hopeful" alternates, Singer and Petrocelli) professed. And, with his characteristic judicial honesty and doughtiness of personality, Judge Dooling acknowledged, "I do not think the issue is set at rest by the interrogation of the jurors. I really think it is implicit in *Sheppard* that notwithstanding interrogation or anything else there is a final and inescapable duty to appraise the entire

picture in terms of what, for lack of a better word, or equal term, can be called good common sense. And I think that is what we have to do."

(It was not until much later in the case (*infra*) that Judge Dooling gave decisional judicial voice (in his proposed memorandum and order dismissing the indictment appendix, *infra*, p. A41) to the doubts and the disturbances of judicial conscience that he had manifested over the course of the above described Valachi proceedings and happenings. But, when the Court of Appeals mandamused Judge Dooling out of his decisional stalwartness (Appendix, *infra*, p. A60), the case took a new turn, which structures the main certiorari issues before this Court (*infra*).)

(Description of Valachi's testimony in this fifth trial will be given in connection with our "*Bruton*" argument under our Reasons, *infra*.)

The jury convicted the defendants in this fifth trial, but thereafter the defendants moved before Judge Dooling to set aside the verdict and to dismiss the indictment, on grounds renewing and "updating" the grounds presented pretrial in 1967 before Judge Weinstein (for dismissal of the indictment on grounds of denial of speedy trial and of cruelty and oppressiveness—*supra*). These post verdict motion proceedings before Judge Dooling consist of record items numbered in the Record on Appeal herein (which would also be the certified record in this Court) numbered 57, 58, 61, 64, 65; plus the stenographic minutes of September 20, 1968 and September 27, 1968 (paged in the Record for those dates as pages 1-321), and the minutes of October 11, 1968 (separately paged as pages 1-22).

The above post verdict proceedings before Judge Dooling bore fruit for the defendants (temporarily). On October 11, 1968 Judge Dooling issued a proposed memorandum and order dismissing the indictment on the ground that "* * * the history of the present case through the date of verdict in the fifth trial, including the merely marginal fairness of the fifth trial, reflects transgression of the due process limitations upon the governmental rights of retrial and orderly deliberateness in seeking retrial * * *". It is held that the aggregate here has reached the point at which to enter judgments of conviction against the defendants would be to deny them due process (appendix *infra*, p. A59).

In announcing this proposed memorandum and order to the parties in open court on October 11, 1968, Judge Dooling stated to the parties that he was striving for two things, (1) to give the defendants a formal ruling or order which would at last relieve them of the ordeal of this prosecution, and (2) to afford to the Government an avenue of appellate review (Tr. Oct. 11, 1968, pp. 3-21). The colloquy on October 11, 1968 included the following (pp. 13-14, 18-19):

> "The Court: I think that the question of preserving to the Government an appellate right here, which is better than a pretty empty mandamus, I take it your people would agree that—
>
> "Mr. Woerheide: This is not appropriate for mandamus.
>
> "The Court: There is too much talk about what mandamus cannot do, to make it very useful at the moment.

"I would say that it is important to explore that, and if some one of us, in defense included, could think up a method of securing a review, well, that's what must be done.

"Now, I do not want this to be the occasion for re-argument of the conclusion, Mr. Woerheide, because I must tell you that, having decided this case fifty times since the verdict came down in May, I can't decide it anymore. I have reached the conclusion that I feel I must reach, and we are treating, now, only with the question of preserving decent reviewability, if our human ingenuity can effect a means of doing it."

* * * * *

"Mr. Edelbaum: Then the only issue remaining to be discussed and decided, so I can address myself to that at that time, is the issue of how, if possible, to preserve the Government's right to appeal. And that is the only issue to be talked about and decided.

"In other words, not to be a re-argument of our motions or anything like that, that you have decided already. That is the only point I am talking about.

"The Court: Assuming there is no revolution in law between now and then. I understand that it is not expected that there will be.

"Mr. Kasanoff: Your Honor, I think I am putting the same question Mr. Edelbaum was asking. It is a question which is a human, practical question, so that I don't make a terrible mistake in my understanding of your Honor's words.

"Will I be incorrect in telling my client and his wife that your Honor has so far decided that he will not proceed to impose a judgment here, and what remains is the question of the form of the order to protect the Government's potential right of appeal?

"The Court: That is right."

Despite Judge Dooling's indication *supra* that he expected the Government to seek an avenue of direct appellate review, and despite Mr. Woerheide's concurrence that mandamus would be inapt in the circumstances, the Government did seek and obtain mandamus in the Court of Appeals (appendix hereto, *infra*, p. A60) rather than seeking a direct appeal remedy.

Upon the issuance of the mandamus order of the Court of Appeals (appendix, *infra*), the case was rescheduled before Judge Dooling for sentencing. The defendants made a last effort to persuade Judge Dooling to effectuate his own declared conclusion that the defendants should go free at last, but, under the minatory overhang of the Court of Appeals' mandamus order, Judge Dooling (we say in all respectfulness) was now apparently a changed man and a changed judge. (Sentencing Minutes, June 6, 1969, pp. 1-68, *passim*). In our Joint Petition for Rehearing in the Court below, printed in the appendix hereto *infra*, p. A24, we have set forth our conception of the impact of the Court of Appeals' mandamus order on Judge Dooling. It is one of our prime objects in this petition for certiorari to try to convince this Court that it should restore judicial initiative (and judicial morale) to Judge Dooling for a proper order of remand in this case.

After Judge Dooling sentenced the defendants in compliance with the mandamus order of the Court of Appeals, the defendants-petitioners appealed to the Court of Appeals, which affirmed the judgment of conviction and Judge Weinstein's pretrial order denying the motions to dismiss the indictment (appendix hereto, *infra*).

Reasons for Granting the Writ

1. In *Brock v. North Carolina*, 344 U.S. 424, 432, Chief Justice Vinson, dissenting, referred scornfully to prosecutors who do not do well in a trial and go on "to insist that it be tried again on another day when it has stronger men on the field." Chief Justice Vinson was expressing the ethical idea of former jeopardy. It is the idea that, in a civilized, constitutionally governed society of high minded men, there are certain ultimate minimum standards of sheer *sportsmanship* that ought to prevail in the use of one's power over other men. No greater power over other men exists, under Heaven, than the power of governmental officials to prosecute and punish people for crime. Government prosecutors, beyond all other men, ought to understand and practice *noblesse oblige*. Fortunately, in our country, there is a magisterial authority that can teach and compel government prosecutors to overcome or at least to restrain their all too frequent ignoble tendencies. That magisterial authority is this Court.

The main, the sufficient reason for granting certiorari in this case is simply to monitor the official intemperateness that has so long bedevilled this case.

2. The Court of Appeals has not questioned Judge Dooling's characterization of this fifth trial as having achieved "merely marginal fairness". After a history of successive retrials as in this case, where the case has been plagued by prosecutive and judicial misconduct that has required appellate reversal, the *highest possible* standard of fairness should be enforced in a later trial, rather than accepting a "merely marginal fairness". This case seems to get tried in a worse and ever worse way every time it is retried. True, petitioners' ultimate succour from this prosecutive ordeal

might therefore be attained by them if they could just have one or two more trials in which they would finally attain to a trial record so prejudicially unfair that appellate reversal and dismissal of the indictment would be assured out of sheer judicial and prosecutive fatigue and revulsion.' We do not think that the administration of federal criminal justice as applied in this case needs to be carried any further than the present record to force a final judicial calling of a halt to this prosecution.

3. Atop the circumstances of the five trials oppressiveness and of the prosecutorial misconduct pervading this history, atop all this, what shall be said of the indicated conduct of the special Washington prosecutors in this fifth trial in having apparently unauthorizedly and deceptively used the respected regional authority of the name of the United States Attorney to aid them in inducting the regional Federal Judge to carry out their highly questionable venture of secretly summoning into this trial the predictably due process-demolishing witness Joseph Valachi? If there was ever a matter calling for this Court's exercise of the "supervisory" power it is this matter of the Washington attorneys' apparently improper use of the initials "JPH" in their secret Valachi papers before Judge Dooling. And if we are correct in our evaluation of this indicated impropriety, that impropriety is but symptomatic of the constitutional callousness of the prosecution's conduct throughout this case.

4. The sheer protraction of this prosecution and the repetition of trials is cruel and oppressive. The drain on defendants in such circumstances is financial, psychological and, almost surely, life-shortening. It is true that, doc-

trially, this Court has never set a numerical limit to the number of times a criminal defendant may be retried, absent the conventional conditions of former jeopardy. However, in *Bartkus* v. *Illinois*, 359 U.S. 121, 127, Mr. Justice Frankfurter recognized that "at some point the cruelty of harassment by multiple prosecutions * * * would offend due process". We realize this referred to State action in the period before the Federal constitutional protection against double jeopardy was applied to the States; but the theme is apt here nevertheless. Cf. *Downum* v. *United States*, 372 U.S. 734, 736—"* * * Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches * * *".

5. There has been a tendency in the Courts below to minimize the specific prejudicial impact on the defendant-petitioners of the denial of "speedy trial". (a) We call attention to the extremely unfortunate matter of Judge Dooling's having permitted the fourth trial testimony of the Akers Terminal witness Gehring to be read into the record in this fifth trial because Gehring simply could not remember any more whether the hi-jacked truck had been stationed on the Union Street or Nevins Street side. Gehring's fourth trial testimony, weak though it was, had helped the Government and Vaccaro on this vital issue of proof. (b) See also the death of petitioner Albanese's witness Eppolito, who had confirmed, in the fourth trial, the testimony of Albanese's wife that Vaccaro had tried to molest her sexually, had thereafter been trounced by Albanese, and had threatened to "get" Albanese; in this fifth trial the Albanese defense was placed in the impossible position of not being able to call Mrs. Albanese as she was

ill and could not face testifying, without the indispensable psychological support of the testimony of her brother Mr. Eppolito who had died in the interim (Tr. 3933-3947, 4097-4123, 4196-4199). (c) Above all there is the "delayed trial" disadvantage to a criminal defendant in the "open-end" opportunity thereby accorded to the prosecution to keep repeatedly returning to the fray of retrial "on another day when it has stronger men on the field"—quoted *supra* from Chief Justice Vinson's dissent in *Brock* v. *North Carolina*.

6. The question of the cruelty and oppressiveness of the five trials ordeal, as distinct from denial of speedy trial, has never been systematically considered or adjudicated by any of the Courts below except by Judge Dooling in his proposed memorandum and order of October 11, 1968 (appendix *infra*, p. A44). This topic is treated in our appendix *infra*, pp. A33-A38, in our Joint Petition For Rehearing in the Court below. We ask leave to incorporate herein those pages A33-A38 of our appendix *infra* in support of our argument in this paragraph.

7. We submit that a sufficient ground for certiorari, without more, is the prejudicial impact of the Valachi publicity on the defendant's right to a fair and impartial jury (see the Statement of the Case, *supra*).

8. (a) We adopt the presentation of the companion petition in *Hugh McIntosh* v. *United States*, on the question of the denial of the petitioners' rights under *Bruton* v. *United States*. (b) Valachi's testimony concerning alleged admissions by some of the petitioners is found at Tr. 2764, 2788-2793. In the event of the granting of certiorari, may we respectfully reserve the right to develop this matter at greater length—or we trust we may be permitted to do so

in a Reply Brief in the present proceedings on petition for certiorari if the Government should address itself to the topic in a Brief in Opposition. (c) The opinion of the Court of Appeals does not treat at all the point that Valachi's testimony branding the defendant Albanese with the odium of having previously presented a false alibi-type defense which Albanese then ignominiously backed away from in this fifth trial, must have had, in the jurors' minds a destructive effect on the case of the other defendants, not only under the conspiracy count, but by inevitable overflow also on the substantive count. (d) The *Bruton* issue as to petitioner Spero is especially clear, as Spero held no conversation with Valachi and was not present at any of Valachi's alleged conversations with other defendants.

8. This Court's decision in *United States* v. *Sisson*, No. 305, Oct. Term 1969, decided June 29, 1970, 38 U.S. Law Week 4616, 4622 contains the following:

> "* * * As Senator Knox said of the bill that was to become the Criminal Appeals Act:
>
> > 'Mark this: It is not proposed to give the Government any appeal under any circumstances when the defendant is acquitted *for any error whatever committed by the court.* . . . The Government takes the risks of all the mistakes of its prosecuting officers *and of the trial judge in the trial*, and it is only proposed to give it an appeal upon questions of law raised by the defendant to defeat the trial and if it defeats the trial. The defendant gets the benefit of all errors in the trial which are in his favor, and can challenge all errors in the trial which are against him.' 41 Cong. Rec. 2752 (1907).

Quite apart from the statute, it is, of course, well settled that an acquittal can 'not be reveiwed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution . . . . [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense.' *United States* v. *Ball*, 163 U. S. 662, 671 (1896).[18]

There are three differences between the hypothetical just suggested and the case at hand. First, in this case it was the judge, not the jury, who made the factual determinations. This difference alone does not support a legal distinction, however, for judges, like juries, can acquit defendants, see Fed. Rule Crim. Proc. 29. Second, the judge in this case made his decision *after* the jury had brought in a verdict of guilty. Rule 29(c) and (d) of the Federal Rules of Criminal Procedure expressly allows, however, a federal judge to acquit a criminal defendant after the jury 'returns a verdict of guilty.' And third, in this case the District Court labeled his post-verdict opinion an arrest of judgment, not an acquittal. This characterization alone, however, neither confers jurisdiction on this Court, see n. 6, *supra*, nor makes the opinion any less dependent upon evidence adduced at the trial. In short, we see no distinction between what the court below did, and a post-verdict directed acquittal."

[18] This principle would dictate that after this jurisdictional dismissal, Sisson may not be retried.

We suggest that our case is governed by the above principles of *Sisson*; or that at the very least our case should be remanded to the District Court for effectuation of Judge Dooling's original intention.

In *Sisson* the Court was not swayed by the District Judge's procedural miscalculation as to providing the Government with an effective right of appeal. Likewise in our case Judge Dooling misestimated the procedural prospects and ended up finding himself mandamused. Also, like Judge Wyzanski in *Sisson*, our Judge Dooling reexamined the trial evidence, and did not merely make determinations of law (see specially Judge Dooling's expressions of dissatisfaction concerning the testimony of the witness Gehring (appendix *infra*, pp. A56, A57).

Can there be any doubt that Judge Dooling *actually intended* to free these petitioners of further jeopardy in this case because he was convinced that this was the justly needed result? Regardless of procedural intricacies, then, in this twilight area of governmental right to appeal or to substitute mandamus for appeal in criminal cases, would it not be the constructive and legally proper course to remand this case to Judge Dooling to afford him an opportunity to carry out his original judicial determination that petitioners be at last relieved of this prosecution. At pages A38-A40 of our appendix *infra* (Joint Petition For Rehearing) we note the circumstances which indicatedly hampered Judge Dooling's independent judiciality after the issuance of the mandamus by the Court of Appeals. Let this Court now unhamper Judge Dooling, and let us see what he would do. Judge Dooling is an exceptionally good judge, an exceptionally good man. This is his case; he knows this case better than any other Judge. Let him be the one finally to decide this case, with this Court's encouragement, *via* an order of remand.

CONCLUSION

It is respectfully submitted that this joint petition for certiorari should be granted.

Respectfully submitted,

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ROBERT KASANOF
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APPENDIX A

Opinion of the United States Court of Appeals Sought to be Reviewed

Nos. 486, 487, 488, 489—September Term, 1969.

(Argued January 23, 1970 Decided April 15, 1970.)

Docket Nos. 34016, 34119, 34235, 34344

UNITED STATES OF AMERICA,

Appellee,

—v.—

CARMINE PERSICO, SALVATORE ALBANESE, RALPH SPERO, and HUGH MCINTOSH,

Appellants.

Before:

MOORE, HAYS and FEINBERG,

Circuit Judges.

Appeals from an order entered in the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge*, denying a motion to dismiss the indictment; and from convictions after a jury trial in the United States District Court for the Eastern District of New York, John F. Dooling, *Judge*, on a charge of robbery of merchandise moving in interstate commerce in violation of 18 U.S.C. §1951 (1964) and of conspiracy to commit such a robbery.

Affirmed.

Opinion of the United States Court of Appeals Sought to be Reviewed

MAURICE EDELBAUM, New York, N. Y. (Lawrence K. Feitell, New York, N. Y., of counsel), *for Appellant Persico.*

ROBERT KASANOF, New York, N. Y., *for Appellant Albanese.*

FRANCES T. WOLFF, New York, N. Y. (Jerome Lewis, New York, N. Y., of counsel), *for Appellant Spero.*

EDMUND A. ROSNER, New York, N. Y., *for Appellant McIntosh.*

ROBERT M. ORNSTEIN, Special Attorney, Department of Justice, Brooklyn, N. Y., Thomas M. Vockrodt, Attorney, Department of Justice, Washington, D. C. (Edward R. Neaher, United States Attorney, Eastern District of New York, on the brief), *for Appellee.*

HAYS, *Circuit Judge*:

Carmine Persico, Salvatore Albanese, Ralph Spero and Hugh McIntosh appeal from judgments of conviction entered after a jury trial in the United States District Court for the Eastern District of New York on a charge of robbery of merchandise moving in interstate commerce 18 U.S.C. §1951 (1964) and of conspiracy to commit the robbery.[1] Appellants also appeal from the denial of their pretrial motion to dismiss the indictment "on the ground that the long delay and repeated trials have seriously prejudiced

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1 Persico and McIntosh received sentences of fourteen and nine years respectively on each count, the sentences to run concurrently. Albanese and Spero received suspended sentences of ten years on each count, the sentences to run concurrently, and were placed on probation.

them and constitute, in effect, cruel and unusual punishment."

I.

Background

The appellants have been tried five times on an indictment filed in April 1960 charging them with hijacking and conspiring to hijack a truck loaded with piece goods from the Akers Motor Lines Terminal in Brooklyn on or about July 28, 1959. The first trial, in May 1961, ended in a jury disagreement. The second trial, in June 1961, resulted in convictions of the present appellants on both counts.[2] We reversed these convictions because of errors at trial. *United States* v. *Persico*, 305 F.2d 534 (2d Cir. 1962). The third trial in the spring of 1963 was aborted as to appellants Persico, Albanese and Spero[3] by the declaration of a mistrial. The jury disagreed as to the other defendants. The fourth trial, which lasted from January to April 1964 resulted in the conviction of all the appellants. We reversed these convictions because of errors in the trial judge's charge. *United States* v. *Persico*, 349 F.2d 6 (2d Cir. 1965).

The fifth trial which is the subject of this appeal took place in April and May of 1968. The jury returned verdicts of guilty on May 9, 1968. On October 11, 1968, in response to appellants' post-trial requests for relief, the trial judge distributed to all parties copies of a memorandum and order which he intended to file, dismissing the indict-

2 Joseph Magnasco was convicted on both counts, but was shot and killed before sentencing. George La Fante was convicted on the conspiracy count only. At the trial of the present case Judge Dooling directed La Fante's acquittal for lack of sufficient evidence.

3 This mistrial was ordered because Persico was shot and wounded on a Brooklyn street.

ment. The decision to dismiss was based on Judge Dooling's conclusion:

> "that the history of the present case through the date of verdict in the fifth trial, including the merely marginal fairness of the fifth trial, reflects transgression of the due process limitations upon the governmental rights of retrial and orderly deliberateness in seeking retrial . . . . It is not suggested that the subtraction of a single element of the whole history through the time of the rendition of the verdict would not require, or at least justify, a different result. It is held that the aggregate here has reached the point at which to enter judgments of conviction against the defendants would be to deny them due process.
>
> "On these grounds it is concluded that Counts 1 and 2 of the indictment must be dismissed by appropriate order as to the moving defendants."

The Government sought mandamus from this court ordering Judge Dooling to enter judgment on the jury verdicts and to impose sentence. We granted the relief requested. *United States* v. *Dooling*, 406 F.2d 192, 198 (2d Cir.), cert. denied, 395 U.S. 911 (1969).

The factual background of this case is relatively simple and has been adequately reported in our earlier opinions. See 305 F.2d at 536, 349 F.2d at 9. As in the earlier trials, the government's case in the latest trial was based primarily on the testimony of Gasper Vaccaro, an alleged co-conspirator, and Edward Kennedy, an employee of Akers Motor Lines and driver of the hijacked truck.[4] However, at this trial for the first time the government called as a

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4 Their testimony is summarized in *United States* v. *Persico*, 305 F.2d 534, 536 (2d Cir. 1962).

witness Joseph Valachi, who recounted certain admissions alleged to have been made by several of the appellants.

Appellants do not attack the sufficiency of the evidence, but make numerous claims of error. We are not persuaded that any of these allegations warrant reversal and therefore affirm the judgments of conviction.

II.

Failure of the Government to Inform the Defense That Joseph Valachi Was to Be Called as a Witness

Appellants contend that the failure of the government to give advance notice of its intention to call Joseph Valachi as a witness requires reversal. Valachi achieved notoriety as a result of his testimony concerning organized crime before a Senate Committee in 1963 and elsewhere. Appellants maintain that the failure to inform them of Valachi's impending appearance prevented their suggesting prophylactic measures to counter the possibility of prejudicial publicity, and deprived them of a proper voir dire of the jury and the full advantage of their peremptory challenges.

There is no obligation on the part of the government to inform the defense of its intention to call a witness when the indictment is for a non-capital offense. See 18 U.S.C. §3432 (1964); *United States* v. *Van Duzee*, 140 U.S. 169, 173 (1891); *Thompson* v. *United States*, 381 F.2d 664, 665-66 (10th Cir. 1967); *United States* v. *Chase*, 372 F.2d 453, 466 (4th Cir.), cert. denied, 387 U.S. 907 (1967); *Dean* v. *United States*, 265 F.2d 544, 547 (8th Cir. 1959).

Appellants' suggestion that the government intentionally and affirmatively misled them into believing that no new witnesses would be called is expressly contradicted by the record.

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III.

Publicity Surrounding the Appearance of Valachi

Shortly after 3:00 P.M. on April 16, 1968, the government indicated its intention to call Joseph Valachi as its next witness. The defense pleaded surprise,[5] objected to Valachi's appearance and questioned his testimonial capacity. The argument on these issues lasted the rest of the day.

That evening and the next morning all the New York newspapers and many of the radio and television stations carried news announcements stating that Valachi was to be called as a witness. Many of these announcements contained details about the trial and the defendants. The article from the Four Star Edition of the April 17, 1968, New York Daily News, which most of the jurors saw, appears in the margin.[6]

5 Appellants allege that the government had "leaked" the news of Valachi's appearance to the press, thus aggravating the publicity problem. The government strongly denies the accusation and, given the tenuous nature of the appellants' "proof," we do not consider this a relevant factor in determining whether the publicity requires reversal.

6 The front page of the Daily News contained in one and one half inch letters the headline: "CALL VALACHI IN COSA TRIAL." The story on page two was headed "Call Valachi to Testify in Hijack Trial." Pictures appeared of Judge Dooling, Persico and Valachi. The text of the article states:

> "The government dropped a bombshell into the hijacking trial of Cosa Nostra figure Carmine (The Snake) Persico and four others when it announced yesterday that it will call underworld informer Joe Valachi as a witness.
>
> "Victor Woerheide, special prosecutor trying the case for the Department of Justice in Brooklyn federal court, introduced his shocker just before 4 p.m. after the jury had been dismissed for the day. Woerheide said Valachi would be called today.
>
> "However, this set off two hours of legal wrangling in the courtroom before U.S. District Judge John F. Dooling Jr. And Dooling put off Valachi's appearance until 2 p.m. Monday.

(*continued on following page*)

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Not all of the jurors were exposed to the same quantity or quality of publicity. However, taking the publicity at

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"This was to give the defense time to prepare for the appearance of the star informant for the FBI, and to inspect records in Washington. The defense lawyers had claimed that Valachi's testimony would make it impossible for their clients to get a fair trial.

"First Court Appearance

"Valachi, the gravel-voiced songbird whose mouthings on the Mafia before the Senate rackets committee in 1963 startled the nation, has never appeared in open court, although he has testified before grand juries.

"Valachi has been brought from the maximum security of the federal prison in Milan, Mich., and is under tight guard in the U.S. Courthouse in Brooklyn. Only federal marshals are permitted near him.

"According to Woerhejde, Valachi will testify about two admissions made by three of the men on trial.

"'These admissions are statements made by the defendants about themselves and (relevant) to the matter on trial,' Woerheide told the court. The statements were made in April 1959 and June 1961, he said.

"Persico, 35, of 144 Sunset Drive, West Hempstead, L.I., graduated out of the Profaci mob that rules Brooklyn to a setup of his own, the government contends. He and the four other defendants are charged with stealing a $50,000 shipment of dry goods July 28, 1959, while it was in interstate commerce.

"The other defendants are Salvatore Albanese, Hugh McIntosh and Ralph Spero, all of Brooklyn, and George Lafante of South Ozone Park, Queens.

"After the jury was dismissed to return at 10 a.m. today, Woerheide disclosed the government's hand on Valachi. He said the prosecution was calling the witness 'in good faith.'

"Answering the defense's protests, the prosecutor notes that Valachi was not himself a defendant or a conspirator in the case. He insisted that the government should not be told whom it can call to prove its case.

"Attorneys for the defendants bitterly attacked the move. They made a variety of motions, calling for a mistrial, asking that the jury be dismissed and another one called, and that the indictment be quashed.

"Rap Lack of Notice

"The lawyers said they would have asked prospective jurors for their opinion of Valachi had they been told ahead of time that the government intended to call him.

(continued on following page)

ts worst it indicated that appellants were connected to the Cosa Nostra; that Persico was nicknamed the Snake; and had graduated out of the Profaci mob; that the case had been tried four times previously; that a special prosecutor from the Department of Justice was trying the case; that Valachi was a former underworld figure who had previously testified concerning organized crime; that the government was concerned for Valachi's safety; and that the admissions about which Valachi was to testify had been made to him while appellants were in prison.

> "Valachi is under a life sentence for the murder, on June 22, 1962, of a cellmate in the Atlanta penitentiary who he suspected was assigned to kill him. Reportedly the underworld has put out a $100,000 'contract' for his assassination.
>
> "Valachi, in nationally televised hearings before the Senate committee, spelled out the workings of the Cosa Nostra or Mafia, as the nationwide underworld syndicate is known. He shed new light on the workings of organized crime in a 300,000 word statement laboriously written by hand on yellow legal tablets in fifth grade English.
>
> "He had been inducted into the Cosa Nostra at the age of 27 in 1930, Valachi said. The ceremony took place in the backroom of a New York restaurant. 'A gun and a knife were on the table. Blood was drawn from the young thug's finger as he told his inductors, 'If I talk, I die.'
>
> "His sponsor was Vito Genovese, 'Capo di tutti capy,' or boss of all bosses in the Mafia.
>
> "From 1930 to 1962, Valachi kept his underworld trust, piling up 18 arrests for burglary, robbery, assault, gambling and dope. Sent to Atlanta in 1959 on a narcotics rap, he learned he was marked for death by Genovese. And he killed the man he thought was sent to kill him."

The fourteen jurors and alternates were examined separately. Three jurors stated they saw only newspaper headlines; ten had read all or part of the article in the New York Daily News and one had read the account contained in Newsday, a Long Island newspaper. In addition, some of the jurors stated that they were exposed to radio and television reports of the trial, which contained essentially the same material appearing in the newspaper articles. It is also possible that at least one of the jurors read the articles contained in the New York Times and/or the New York Post.

The publicity to which the jurors were exposed did not deal with the issues of appellants' guilt, as in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), and *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), but involved background information. Most of the material, save the reference to Cosa Nostra which we believe to have been dealt with effectively, was brought out at trial as competent evidence.

The three weeks that passed before the jury was called upon to make its decision also served to blunt much of the adverse effect of the publicity. See *United States* v. *Kahaner*, 317 F.2d 459, 470 (2d Cir.), cert. denied, 375 U.S. 836 (1963).

Appellants moved for a mistrial on the ground that the publicity prejudiced the jury, making it impossible for them to receive a fair trial. The trial judge took prompt and effective corrective action. See *United States* v. *Agueci*, 310 F.2d 817, 832 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963). He held a separate voir dire of each juror, frankly and candidly discussing the problems caused by the publicity. He correctly isolated the reference to the Cosa Nostra as the most potentially prejudicial aspect of the publicity and placed that element in its proper perspective by instructing each juror that it was completely irrelevant to the case.[8] After completing this process and carefully

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8 For example, the voir dire of juror Charles Cohen went as follows:

"The Court: Mr. Cohen, we are quite concerned about whether or not the newspaper, radio and television publicity that our case has received might have had some affect [sic] on the Jury's attitude towards the case, and I do want to ask some questions about that.

"Did you have a chance, Mr. Cohen, to read any of the newspaper articles or to hear any of the radio or television material?

"Mr. Cohen: Yes, sir, I did.

"The Court: Did you see the Daily News article?

"Mr. Cohen: Yes, I did.

"The Court: I think that had the completest material.

(*continued on following page*)

considering the problem, Judge Dooling concluded that, although the publicity was prejudicial, the jurors remained capable of giving the appellants a fair trial. In denying a motion for mistrial, he stated:

"Mr. Cohen: I did.

"The Court: Did you see the Times article?

"Mr. Cohen: No.

"The Court: Now, has there been any discussion of the articles and of the radio and television material in the Jury room?

"Mr. Cohen: I wouldn't say exactly discussion, there might have been a mention that this person read it, someone else said they bought the paper and tore it off the front page, that they didn't want to go any further, and that was about the general extent.

"The Court: Was there any talk about the pictures that were in the Daily News?

"The Witness: There was one mention of your picture.

"The Court: I am never going to live this down.

"Mr. Cohen, as you know, this case is about one thing and one thing only, and that is this:

"Whether or not the defendants or some of them did or did not obstruct the movement in interstate commerce of that Aeres [sic] truck by robbery, or whether one or more of them conspired with the others about that.

"It is not about anything else.

"Now, if any effort had been made to introduce into this Courtroom here testimony about Cosa Nostra, it would have been excluded because it has absolutely nothing to do with whether or not these defendants interfered with that truck shipment. Just because that couldn't be brought in against them, for the same reason these men cannot defend themselves against it, they can't come in and try to present the testimony to negative this at all.

"As a matter of fact there isn't any such crime as Cosa Nostra, you can't be indicted for Cosa Nostra in any Court anywhere, and so these men have never had a chance to meet that charge anywhere, and they never will be able to come into a Court and blast it out of the water.

"It is a smear and it pursues them and there is nothing they can do about it, it is just talk and they can't meet it no place, and they can't even meet it here today because it has nothing to do with this case.

"Nevertheless, there it is, it has been said.

"Now what we have to try to figure out is whether or not the fact that it has been said and the way it has been said and that it comes inevitably to the notice of you Jurors means we are in

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"Some very considerable part of the prejudicial matter is strongly implied by other evidence properly in the case, by the competent substance of Valachi's testimony and its essentially indivisible nature and by the very calling of Valachi as a witness and the identifying of his criminal record.

"But the publicity and the other circumstances attending Valachi's testimony, added to the inevitable and inescapable atmosphere and tensions of this trial, is not accurately measurable; but I am unable to find indications that it is sufficient as to prevent a fair trial.

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trouble in assuring them the fair trial that each one of us wants to see that they get, and the Jurors most of all.

"So what I want to ask you is whether notwithstanding the publicity, you can say whether or not you are satisfied about your capacity to listen to the evidence in this case and to no other evidence, no other talk, and decide this case fairly to them and to the Government without reference to this publicity.

"Do you think you are up to that or is that something that you would say is beyond the compass of the human mind?

"Mr. Cohen: No, I would say that I would be able to continue.

"The Court: Here is one way of putting it up to you, it calls upon you to perform a kind of an imaginative feat that is pretty unreal but I wish you would make the effort:

"Put yourself in the position of one of the defendants here, think of him as being on trial before this Jury, and then look into your own mind with his eyes and tell me whether or not you think that your mind, looked at with the eyes of one of the defendants, would appear to him to be the mind of the man that he wants to have stay on this Jury:

"Now, tested by that standard, what is your answer, would you be able to continue fairly to both sides in this case?

"Mr. Cohen: That would be my answer, to continue and be fair by what I hear.

"The Court: Thank you, sir.

"Now, when you go back to the Jury Room, Mr. Cohen, I would ask you not to discuss our interview with any of the other Jurors because we want to get their individual reaction.

"Mr. Cohen: I understand.

"The Court: And responses.

"Mr. Cohen: I understand, yes, sir.

"The Court: Thank you, sir."

> "The existence of this readily regrettable prejudicial matter challenges the jury to be fair, to be faithful to their oaths. The jury cannot be taken to lack either the will or the capacity to base their verdict only on the evidence properly before them. The issues of fact are simple. The irrelevant prejudicial matter is easily isolated, and I find no basis for concluding that the jury will be unequal to its task."

We think this determination was correct both because the publicity objectively viewed in the setting of the trial was not so prejudicial to Persico or to his co-defendants that declaring a mistrial was the only avenue open to the trial judge, and because proper corrective procedures were employed.

The issue of whether the nature of prejudicial publicity is such that a fair trial cannot be had is always difficult and "each case must turn on its special facts." *Murshall* v. *United States*, 360 U.S. 310, 312 (1959) (*per curiam*). v. *United States*, 360 U.S. 310, 312 (1959) (per curiam). The trial judge has broad discretion in determining whether prejudice has resulted. E.g., id.; *Holt* v. *United States*, 218 U.S. 245, 251 (1910).

Since the publicity was not inherently prejudicial, consideration of its effect upon each juror is crucial. The essential question which had to be answered was whether the jurors retained the requisite impartiality. Judge Dooling was in the best position to make this difficult evaluation. We attach great weight to his determination that the publicity did not prevent a fair trial.

IV.

Claim That Valachi's Testimony Violated the Rule of Bruton v. United States

Each of the appellants attacks certain of Valachi's testimony as violative of the rule announced in *Bruton* v. *United States*, 391 U.S. 123 (1968), and declared retroactive in *Roberts* v. *Russell*, 392 U.S. 293 (1968) (per curiam).

Appellants' claims are addressed to two portions of Valachi's testimony. Valachi was asked about a conversation he was alleged to have had with Albanese. He answered:

> "Well, he went on to tell me that this fellow Chink [Vaccaro] used to go out with him and his friends, and he mentioned Junior [Persico] and—[interruption]
>
> . . .
>
> "Then he went on to tell me how this Chink used to go out with him on hijackings and—including the Aker [sic] job . . . ."

Persico contends that Valachi's reference to Junior, by which the jury knew he meant Persico, constitutes a violation of the *Bruton* rule since it was an inadmissible inculpating hearsay statement. We reject this construction on the ground that Valachi's statement about Junior did not inculpate Persico. What Valachi said was merely that Albanese knew Persico or, at most, that Persico was a friend of Albanese, a fact that came out in other competent testimony.

On similar grounds we reject the argument advanced by McIntosh and Spero that Valachi's statement about Albanese's reference to "his friends" must have been thought by the jury to refer to, and therefore to inculpate, them.

Valachi also testified to a conversation he had with Persico in the presence of Albanese and McIntosh who had joined them at the request of Persico. Valachi said:

> "He wanted some advise [sic]. He knew I'd been around. I knew who he was, he knew who I was, through friends. He wanted to know—first he told me he'd been paying taxes on all the hijackings that he's been pulling especially the one that he was on trial for, the Aker's [sic] tauck. He paid Joe Profachi [sic] $1800. He wanted to know if he was in his rights having trouble with Joe Profachi [sic].
>
> "Well, in my experience I was astounded . . .
>
> [Interruption]
>
> "A. I told him it was not taxes at all, it was an out and out shakedown and he was 100 percent right in having trouble with Joe Profachi [sic].
>
> "Q. Did Mr. Persico say anything to Mr. Albanese or to Mr. McIntosh in your presence? A. He told them in the future, 'Pay attention to Joe. Listen to him. You want any advise [sic], ask him.' That's all.
>
> "Q. When he said Joe, to whom was he referring? A. Me."

Albanese and McIntosh claim that the admission of Valachi's testimony that they were present at the time Persico admitted his part in the Akers' hijacking constitutes a violation of *Bruton*. However, as the trial court held:

> "That testimony was, however, directly descriptive of the observed acts of Albanese and McIntosh and Valachi could be fully cross-examined about what he saw and what obedience to Persico's command he observed; the testimony did not relay to the jury words

of a non-testifying Persico that accused Albanese and McIntosh of complicity in the crime."

Moreover, the trial court correctly instructed the jury that complicity could not be inferred from silence.

V.

Limitations on Cross-Examination

The trial judge ruled that two of the government's witnesses, Vaccaro and Cancelli, need not disclose their addresses or places of employment. The appellants contend this limitation violated their Sixth Amendment right to confront the witnesses against them. They rely heavily on *Smith* v. *Illinois*, 390 U.S. 129 (1968), and *Alford* v. *United States*, 282 U.S. 687 (1931). In *Smith*, a crucial prosecution witness testified under a false name and the defense was not allowed to elicit his true name or address on cross-examination. The Court reversed the conviction since "The witness' name and address open countless avenues of in-court examination and out-of-court investigation." Id. at 131. In *Alford*, the defense was prevented from obtaining the address of a crucial prosecution witness, who defense counsel had reason to believe was then in custody, id. at 693. The Court also reversed that conviction.

The Court in *Smith* quoted with approval language from *Alford*:

> "There is a duty to protect him [the witness] from questions which go beyond the bounds of proper cross-examination merely to harass, annoy, or humiliate him." *Alford*, at 694; *Smith*, at 133.

And the illuminating concurrence of Mr. Justice White reads in pertinent part:

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"In *Alford* v. *United States*, 282 U.S. 687, 694 (1931), the Court recognized that questions which tend merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. I would place in the same category those inquiries which tend to *endanger the personal safety of the witness*. But in these situations, if the question asked is one that is normally permissible, the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the question. The trial judge can then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling. Here the State gave no reasons justifying the refusal to answer a quite usual and proper question. For this reason I join the Court's judgment and its opinion which, as I understand it, is not inconsistent with these views. . . ." Id. at 133,34 (emphasis added).

It was primarily out of fear for the witnesses' personal safety that Judge Dooling limited cross-examination. We think that his determination was correct. After his conviction at the second trial, but before sentencing, a co-defendant Joseph Magnasco was shot dead. The third trial was aborted in 1963 because Persico was shot and wounded on a Brooklyn street. See *United States* v. *Bennett*, 409 F.2d 888, 901 (2d Cir. 1969), cert. denied, —— U.S. —— (19——); see also *United States* v. *Marti*, slip opinion p. 1415 (2d Cir. Feb. 3, 1970); *United States* v. *Palermo*, 410 F.2d 468, 472 (7th Cir. 1969); *United States* v. *Varelli*, 407 F.2d 735, 750-51 (7th Cir. 1969).

In the case of the witness Vaccaro the limitation is further justified by the fact that he was well known to all defendants and their counsel, having testified at the four

previous trials. His background was explored in great detail on cross-examination and the defense was informed of the nature of Vaccaro's recent activities. Moreover, the defense showed no "particularized need" for the information requested, *United States* v. *Bennett, supra.* Cancelli was known to the defense since he testified at the fourth trial. His testimony was not of central importance like that of the witnesses involved in *Smith* and *Alford.*

VI.

Evidence of Other Crimes

Appellants contend that prejudicial testimony concerning other crimes was erroneously admitted. Valachi's testimony included a reference to the Akers hijacking as one in a series and mentioned that Persico, and possibly, by implication, other appellants, were involved with one Profaci.[9]

As the trial judge noted, Valachi's testimony as to other crimes and criminal propensity was so closely bound up with his directly relevant testimony with regard to the Akers hijacking that unless the jury believed the relevant testimony it is quite unlikely that it would have been influenced by the accompanying testimony of other crimes. Moreover, much of Valachi's testimony of other crimes related to a course of conduct involving repeated instances of hijacking. This evidence was not inadmissible since it tended to support the testimony as to the Akers job.

Appellants complain of the admission of testimony about a stolen car. However since the stolen car was used in the

9 Profaci was said to head an underworld group at war with the so-called Gallo gang for control of a substantial portion of organized criminal activities. Thus appellants maintain the reference to Profaci, assuming the jury knew who he was, indicated criminal propensity.

hijacking the evidence was correctly admitted. McCormick, Evidence §157, at 327 (1954) (quoted with approval in *United States* v. *Bradwell*, 388 F.2d 619, 622 (2d Cir.), cert. denied, 393 U.S. 867 (1968), and *United States* v. *Rozza*, 365 F.2d 206, 213 (2d Cir. 1966)).

VII.

Repeated Retrials and the Right to a Speedy Trial

Appellants contend that the repeated trials, and the delay of two and one half years[10] following this court's reversal in July 1965 of the verdict in the fourth trial, violated their right to a speedy trial and constitute cruel and unusual punishment. They claim that the indictment should have been dismissed on their motions and that they should not have been subjected to a fifth trial.

The claim that the indictment should have been dismissed because of the repeated retrials of this case was made to this court after the fourth trial and was rejected and a fifth trial ordered.

As for the claim of denial of a speedy trial, it appears from the record that the defendants acquiesced in the repeated postponements. There is no indication of "purposeful or oppressive" delay on the part of the government. *Pollard* v. *United States*, 352 U.S. 354, 361 (1957). Moreover at no time prior to their motion in 1967 to dismiss the indictment did defendants make a motion to speed up the trial of their case or attempt in any other way to secure an early trial. See id. at 362 n. 8; *United States* v. *Aadal*, 407 F.2d 381, 382 (2d Cir.) (per curiam) (and cases cited therein), cert. denied, 394 U.S. 1008 (1969); *United States*

10 The delay, which occurred as a consequence of defendants' motion to dismiss the indictment, denied by Judge Weinstein on December 13, 1967, cannot be attributed to the government.

v. *Lustman*, 258 F.2d 475, 478 (2d Cir.), cert. denied, 358 U.S. 880 (1958).

As the trial judge found, the specific circumstances advanced by appellants as constituting prejudice resulting from delay are not impressive.

Albanese's witness Eppilitto died between the fourth and fifth trials. He had corroborated in part Mrs. Albanese's testimony that Vaccaro attempted to rape her. At this trial the defense did not call Mrs. Albanese—perhaps because Valachi testified that Albanese admitted that the rape story had been fabricated. If Mrs. Albanese had testified, appellant could have read Eppilitto's prior testimony into the record. Moreover the government was ready to go to trial while Eppilitto was still alive and the trial delay past that point was not occasioned by the government.

Some possible witnesses to the hijacked truck's standing empty on the street had disappeared by the time of the instant trial. However, the F.B.I. memorandum disclosing the existence of these witnesses was admitted into evidence. The witnesses were not called at the fourth trial though they were then available.

The last special circumstance cited by the appellants was the failure of Gehring, who was terminal manager of Akers in 1959, to recall events to which he had testified in 1964. However, not only was Gehring a witness for the government, but his previous sworn testimony was available for use at this trial.

VIII.

Miscellaneous Contentions

Appellants' other assignments of error do not merit extensive treatment.

Spero claims that the questioning by the government of Kennedy, the driver of the hijacked vehicle, which estab-

lished the fact that Spero's parents and Kennedy's sister-in-law resided at the same address, was undertaken to convince the jury that Spero was not identified by Kennedy because of an improper approach made by Spero or Spero's family to Kennedy or Kennedy's family. However, the evidence clearly established that Kennedy could not identify any of the hijackers because he had been blindfolded.

There was no impropriety in government counsel's consulting with law enforcement officials familiar with the area from which the jury was chosen during the jury selection process. See *Hamer* v. *United States*, 259 F.2d 274, 278-81 (9th Cir. 1958), cert. denied, 359 U.S. 916 (1959).

The appellants were not prejudiced by the discreetly conducted investigation of a juror and the trial judge's decision to excuse her on the ground that her husband had been convicted of an offense growing out of hijackings committed in the same neighborhood as that involved in the instant case was well within his discretion. See *United States* v. *Zanibito*, 315 F.2d 266, 269 (4th Cir.), cert. denied, 373 U.S. 924 (1963).

Finally the prosecutor's reference in his summation to uncontradicted evidence did not amount to a comment upon appellants' failure to take the stand. *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266 (2d Cir. 1969) (and cases cited therein).

Affirmed.

APPENDIX B

Judgment of Affirmance

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of April one thousand nine hundred and seventy.

Present:

HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CARMINE J. PERSICO, JR., et al.,
Defendants,

CARMINE J. PERSICO, JR., SALVATORE ALBANESE,
HUGH MCINTOSH AND RALPH SPERO,
Defendants-Appellants.

(and three other cases)

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Order of United States Court of Appeals Denying Rehearing

34016, 34119, 34235, 34344

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CARMINE J. PERSICO, JR., et al.,
Defendants.

CARMINE J. PERSICO, JR., SALVATORE ALBANESE, HUGH McINTOSH AND RALPH SPERO,
Defendants-Appellants.

(and three other cases).

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied and that the alternative motion for stay of mandate and to continue bail pending application for a writ of certiorari is denied.

LEONARD P. MOORE
PAUL R. HAYS
WILFRED FEINBERG,
U.S.C.J.J.

May 8, 1970

APPENDIX D

Order of United States Court of Appeals Denying Rehearing En Banc

34016, 34119, 34235, 34344

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CARMINE J. PERSICO, JR., et al.,

Defendants,

CARMINE J. PERSICO, JR., SALVATORE ALBANESE, HUGH MCINTOSH AND RALPH SPERO,

Defendants-Appellants

(and three other cases).

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

EDWARD LUMBARD
Chief Judge

May 19, 1970

APPENDIX E

Joint Petition for Rehearing and Hearing En Banc

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 34016, 34119, 34235, 34344

UNITED STATES OF AMERICA,

Appellee,

—against—

CARMINE PERSICO, JR., SALVATORE ALBANESE,

Defendants-Appellants.

JOINT PETITION FOR REHEARING AND HEARING *EN BANC*

To: *The Honorable Leonard P. Moore, Paul R. Hays and Wilfred Feinberg, Circuit Judges*

and

To: *The Honorable Chief Judge J. Edward Lumbard and the Circuit Judges of the United States Court of Appeals for the Second Circuit, En Banc.*

The above named appellants respectfully submit this joint petition for rehearing of the decision rendered in this case on April 15, 1970. If this joint petition is denied by the Panel, we petition for an *en banc* determination.

I. Introductory

This "veteran" case, tried five times in the Eastern District of New York has engaged during its appellate history the full-scale decisional attentions of six Judges of this Court—Chief Judge Lumbard, former Judge (now Mr. Justice) Marshall, and Judges Moore, Smith, Hays and Feinberg.* The case thus would hardly seem to need

* Also District Judges Ryan and Metzner, sitting by designation in this Court.

an "Introductory" here, but since we are asking for alternative *en banc* consideration, and since this criminal case does have a perhaps unparalleled overall record, both as to length and as to the numerousness of first-rank issues of constitutionally fair trial, we offer the following preliminary remarks:—

All undersigned counsel respectfully deem that this joint petition for rehearing presents a classically proper occasion for exercise of the rarely used power to grant rehearing. Indeed, we urge that in the peculiar circumstances of this case the Court's rehearing power merges with its power to supervise criminal proceedings in the District Courts. Cf. *United States* v. *D'Angiolillo*, 340 F. 2d 453 (C.A. 2, 1965), cert. denied 380 U.S. 955. We particularly invoke the "supervisory power", *via* this rehearing effort, because we realize that some of our grounds for rehearing (*infra*) may not have been distinctly formulated in the appellants' briefs on the original argument.*

For the information of the Judges of this Court who are not members of the latest Panel in this case, see the within opinion of April 15, 1970 for a summary of the earlier four trials (slip op., p. 2279). Of those four trials, two of which were held in 1961, one in 1963, and one in 1964, one ended in a jury disagreement, one in partial mistrial and partial jury disagreement; and two in convictions which this Court reversed. The grounds of the latter two reversals are believed to be especially significant for the purposes of this rehearing application. For, the issues herein arising out of the subjection of these federal criminal defendants to five successive trials on the

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* We trust this petition does not go beyond the meaning, or spirit, of Rule 40, F.R.A.P., in raising grounds inappropriate for rehearing, as disapproved, in *e.g.*, *Anderson* v. *Knox*, 300 F. 2d 296 (C.A. 9, 1962)—where nevertheless the Court treated the offending petition with procedural liberality. See the similarly liberal use of the rehearing procedure allowed in *Zarzour* v. *United States*, 391 F. 2d 598 (C.A. 5, 1968)—where the rehearing Panel included then District Judge Carswell, sitting by designation.

same indictment, and especially the final harvest of constitutional rankness which choked all remaining constitutional life out of this case during the recent fifth trial itself, can be best understood—in the herein urged terms of due process, multiple jeopardy, and cruel and oppressive administration of federal criminal justice—when one has well in mind the whole retrospective of this case, including especially the fact that this Court twice found it necessary to reverse judgments of conviction not just on conventional grounds of reversibly prejudicial legal error but on grounds of (we intend no disrespect to anyone) the sheer intemperateness of either the trial Judge or of the prosecutor or both. 305 F. 2d 534, 349 F. 2d 6. Long ago this case became *adjudicatedly* (by this Court), a sort of *bete noire* of *unconstitutional* over-zealousness to clap people into a federal prison. Now, in this fifth trial, a climax of prosecutive overzeal was achieved.

II. The *in limine* importance of the question of sufficiency of the evidence.

The Court's opinion of April 15, 1970 states that, "Appellants do not attack the sufficiency of the evidence * * *" (slip op., p. 2281); and that, "The factual background of this case is relatively simple and has been adequately reported in our earlier opinions. See 305 F. 2d at 536, 349 F. 2d at 9" (*id.*, p. 2280).

When we mentioned, in our Introductory, *supra*, our concern lest we overstep the bounds of the rehearing procedure by urging grounds not distinctly presented by us at the original argument herein, what we had most acutely in mind was this question of the sufficiency of the evidence, and the question of the adequacy of the Court's own treatment of the evidence as having been "adequately reported in our earlier opinions" (*ibid*).

It is unfortunately true that appellants' counsel did not in a distinct or systematic way, brief the issues of sufficiency of the evidence in our briefs on the original argument herein. Now that appellants must think of the cer-

tiorari avenue, we have engaged additional counsel (Mr. Glasser), who did not participate in the present appeal or in the within fifth trial, but who wrote the briefs for all appellants in the 1965 appeal (349 F. 2d 6) and for appellants Persico and LaFante in the 1962 appeal (305 F. 2d 534). On the advice of this newly-engaged counsel we hereby hazard, with all earnest respectfulness, the following rehearing suggestions as to the evidentiary questions in this case:—

This Court noted in the 1965 reversal (349 F. 2d 6) the dispositive importance of the question of the credibility of the accomplice witness Vaccaro, and that the Court had likewise spoken about the win-or-lose importance of this credibility issue in the opinion on the 1962 reversal (305 F. 2d 534, at 536-537), where the 1962 Panel had said (quoted by the 1965 Panel), "We must therefore scrutinize any claimed error with extreme care since there is grave possibility of prejudice to the defendants in a case such as this by error which might in other circumstances be deemed relatively minor."

In the records on the 1962 and 1965 reversals the accomplice witness Vaccaro was wholly uncorroborated or insignificantly corroborated. In this fifth trial the Government produced "corroboration" through the testimony of the sensational personage known as Joseph Valachi, who told of self-inculpatory admissions made to him by some of the present appellants. This Valachi "corroboration" is further noted *infra*.

In the 1962 and 1965 appeals the appellants vigorously challenged the sufficiency of the evidence given against them by Vaccaro. Passing the 1962 appeal, let us note the 1965 appeal on this question of sufficiency of the evidence. In that 1965 appeal this Court evidently agreed with the appellants that, above all, the dispositive factual point in Vaccaro's description of the alleged hi-jacking of the Akers truck on July 28, 1959—the alleged *corpus delicti* of this case—was Vaccaro's assertion that the entire preparatory observational phase of the hi-jacking was carried out through observations by him on what is known

as the "Nevins Street" (Brooklyn) side of the Akers truck terminal. However (details *infra*), there was at least very grave doubt—we are still speaking of the record in the 1965 appeal—that the hi-jacked Akers truck in question was ever actually located on the Nevins Street side of the Akers terminal where Vaccaro claimed he conducted his hi-jack preparatory observations, and instead there was strong defense proof that that truck was at the pertinent times located on what is known as the "Union Street" side of the Akers terminal. The importance of this alternative location of Nevins Street *versus* Union Street was, concededly by all concerned, in the trial which led to the 1965 reversal, that if the truck was on Union Street, rather than on Nevins Street, Vaccaro had to be lying *in toto* and the jury had to acquit the defendants. For a full exposition of this crucial Union Street-Nevins Street issue in the 1964-1965 proceedings, see the printed "Brief For Appellant Carmine Persico, Jr." in Docket No. 29271, at pp. 22, 23, 24-25, 26-28.* And, as above indicated, this Court in the 1965 reversal apparently well appreciated the decisive importance of this Union Street-Nevins Street issue.

In the within fifth trial—the 1965 reversal having been as to the fourth trial—the Union Street-Nevins Street proofs were even worse for the Government than in the fourth trial which resulted in the 1965 reversal. Vaccaro, again in this fifth trial as before, swore the truck was on the Nevins Street side. But, also, again, he was unambiguously contradicted by the truck driver himself, Kennedy, who swore the truck was on the Union Street side (fifth trial, Tr. 3335-3337). Also, the Akers terminal manager, Gelfing, who in the fourth trial had given very "lightweight" and severely impeached testimony that the truck was on Nevins Street (see the Persico brief in no. 29271, op. cit. *supra*, at pp. 26-27), now in this fifth trial

* We respectfully request the Panel, and the entire Bench, to please examine the above cited pages of Persico's 1965 brief in no. 29271.

could not remember at all where the truck was located, and was permitted, over strenuous defense objections, to be salvaged as a prosecution "witness" on this all-important point by Judge Dooling's letting the prosecutor read to the jury Gehring's fourth-trial testimony on the ground of "lapse of memory".* For the entirety of Gehring's relevant testimony in this fifth trial see Tr. 3700-3796, 3814-3864.**

But the probative development in this fifth trial which above all made the Union Street-Nevins Street proofs even worse for the Government this time than in the fourth trial, was that the defense this time had at last been able to locate the Akers truck dispatcher, Patrick Joseph Maloney, who was the one man in the best (and in the only) position really to know, *as a disinterested witness*, the answer to the literally fatal (for both sides in this case) question of Union Street *versus* Nevins Street. The witness Maloney unequivocally swore—unshaken by a ferocious cross examination of the surprised prosecutor—that the truck in question was on the Union Street side, that it could not have been moved from Union Street to Nevins Street except on orders to him personally, that he received no such orders, and that, indeed the giving of such an order would have been unprecedented and had never occurred in his experience with regard to any like situation at the Akers terminal. The entirety of Maloney's testimony appears in this fifth trial transcript at 4038-4091.†

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* Another unfortunate omission by appellants' counsel herein on the original argument in this appeal was our failure to argue the issue of Judge Dooling's error in receiving this 1964 testimony of the forgetful witness Gehring. See our contention concerning this at Tr. 3700-3796, 3814-3864, *passim*.

** We are obliged once again to address ourselves to the Panel, and to the entire Bench, with an importuning request that the Honorable Judges should please read the entirety of the above cited testimony of the prosecution witness Gehring in this fifth trial.

† We respectfully reiterate the request addressed to the Judges in our last preceding footnote, and we urge that the Judges please read the entirety of the above cited Maloney testimony.

Lest there be any doubt in anyone's mind that the within convictions cannot stand if the truck was on the Union Street rather than on the Nevins Street side of the Akers terminal—which was conceded by all concerned in the fourth trial as above noted—we ask the Court to look at the prosecutor's summation in this fifth trial, at p. 4473, where Mr. Woerheide told the jury, referring to defense counsel's argument that Vaccaro could not physically possibly have carried out his claimed preparatory hi-jack observations if the truck was on the Union Street side:—"And I adopt that—to see them loading those trucks you have to get down to the Nevins Street side. * * * So if you are going to do a hi-jacking and you send a man down there to spot a load, the place to spot a load is on the Nevins Street side. * * *"

Why the foregoing items in the present fifth-trial record concerning the Union-Nevins evidentiary issues were not explicitly argued in counsels' briefs for appellants on the original argument in this appeal, is a question over which we would fain draw the veil. We (counsel) now see that we were wrong in not sooner herein arguing this literally *dispositive** evidentiary material. We now pray the Court to give us the benefit of a creative exercise of the Court's rehearing powers to re-open for our clients this vital area of the trial proofs from the appeal-argument standpoint, *via* the above suggested merging of the Court's powers to rehear appeals, and to supervise the administration of federal criminal justice in the District Courts.

"Makeweight" arguments are never tasteful for speaker or hearer, but may we add the following:—In the Court's exercise of the "supervisory power" which we are invoking for this case, it is justifiable, we submit, that the case be regarded by the Court as unitarily embracing the records of all five trials (together, indeed, with the record of the recent mandamus proceeding in this Court, *United States*

* During its deliberations the jury asked for only two things, one of which was the entirety of the photographic exhibits relating to the Union-Nevins scene (Tr. 4541).

v. *Dooling*, 406 F. 2d 192 (C.A. 2; 1969), cert. denied 395 U. S. 911, where the Court mandated the fifth trial Judge to impose sentence—this mandamus phase is further treated *infra* in another connection). If this latter suggestion of ours has merit, would it not follow, in fairness, and in the fair fulfilment of the "supervisory power", that the Union-Nevins issue which was so determinative in the fourth trial and is lodged with equal or greater determinative potential in the record of this fifth trial, should not be finally laid aside by this Court in the present appeal, even though appellate vitalization of the issues may have to depend on resort to the rehearing procedures.

Furthermore, at least to a "marginal" extent, the Union-Nevins issue may (with the help of a generous reading of the briefs now to be mentioned, which we hereby request) be viewed as having been preserved in this appeal in the brief on the original argument herein for appellant Persico at pp. 55n, 63-64, 70-71, and in the brief for appellant Spero at p. 56. Nor can there be any doubt that the issue was preserved in the trial record; see the citations *supra* as to the testimony of the witnesses Kennedy, Gehring and Maloney; see also the summations of counsel to the jury at 4223-4224, 4237-4239, 4246-4248, 4251-4261, 4297-4298, 4348-4351 (see especially), 4443-4451, 4458-4473. Also, Judge Dooling himself spoke, repeatedly, in his proposed memorandum and order (proposing to dismiss the indictment, over-ridden by this Court's above cited mandamus decree), of the disturbing features of the Government's Union-Nevins proofs with special reference to the Gehring testimony.

We mentioned earlier under this heading that in this fifth trial the accomplice witness Vaccaro—the contradiction of whose Nevins Street testimony is so vital for an ultimately just disposition of this case—for the first time gained a new "corroboration" from the prosecution testimony of the professional informer Joseph Valachi. While we treat later herein in separate connections certain offered rehearing issues concerning the Valachi phase of

this case, it may be mentioned at this place, in concluding our discussion of the Union-Nevins issue, that, if (as we claim) Vaccaro's *indispensable Nevins Street* assertions stand insufficiently proved on the present record, which in turn absolutely must mean that Vaccaro has lied *in toto* about the appellants' alleged guilt in this case, it necessarily follows that Valachi's ostensible "corroboration" of Vaccaro is, if possible, an even more outrageous frame-up than Vaccaro's own indicatedly frame-up testimony—for, obviously, if Vaccaro has committed an outright fabrication about the whole *corpus delicti* of this case in regard to the present appellants, then what depths of the human potentiality for mandaciousness must one plumb to characterize the *a fortiori* (*ad infinitum* might be the better figure of speech) conscienceless lying of a Joseph Valachi, who has indicatedly piled a perjurious "corroboration" frame-up on the shoulders of Vaccaro's perjurious "direct evidence" frame-up.

It remains for us to address ourselves to the final, and (to us) professionaly painful, matter of just what specific rehearing relief we may ask of this Court on this matter of the sufficiency of the evidence which, we well realize, the Court may decide to treat as precluded owing to our omissions or inadequacies in our briefs on the original argument. We therefore now respectfully pray that the Court exercise its combined powers of rehearing appeals and of supervising District Court criminal cases, to grant us something in the nature of a plenary rehearing of this very unusual case, so as to afford to our hapless clients (i.e., it is not our clients' fault that their attorneys may have been imperfect) this opportunity to address themselves to the above described questions of sufficiency of the evidence.

III. The constitutional difficulties resulting from the succession of five trials.

The Court's decision herein of April 15, 1970 deals with the above topic in what respectfully seems to us to be a compartmentalized analysis resulting in constitutional injustice.

In the slip opinion at pp. 2279-2280 the Court notes that Judge Dooling issued a proposed memorandum and order dismissing the indictment on a ground of "aggregate" denial of "due process" reflecting "transgression of the due process limitations upon the governmental rights of re-trial and orderly deliberateness in seeking re-trial" (quoting from Judge Dooling's language).

The slip opinion also notes (p. 2280) that this Court mandamused Judge Dooling to enter judgment on the jury verdicts and to impose sentence (*ibid*).

The only other mention of this topic of the five trials in the slip opinion is at pp. 2294-2295, where the Court rests upon its 1965 ordering of a fifth trial (the fourth trial conviction being reversed), and where the Court treats a number of contentions of the appellants in a manner circumscribing those contentions strictly within the framework of the issue of "speedy trial", the Court making no mention of the more deep-rooted constitutional contentions of the appellants in terms of due process, double jeopardy and cruelty and oppressiveness in subjecting the appellants to these five successive trials.

Something has gone wrong here, we must respectfully say. Something has gone wrong in the discourse between appellants' counsel and this Court on the real meaning (as we, appellants' counsel, respectively conceive the problem) of the five-trial issue.

There were the first four trials, bringing this case into the year 1965, and at the end of the fourth trial this Court did remand for a fifth trial. There then followed a delay of some three years and more—attribution of responsibility or "blame" for that delay we do not here argue—

before the fifth trial. Just prior to the fifth trial the appellants moved before Judge Weinstein, on comprehensive constitutional grounds (i.e., including due process, double jeopardy and cruel and inhuman punishment, and not merely on grounds of "speedy trial"), to bar the fifth trial, and Judge Weinstein denied those motions in a short, somewhat cryptic order whose exegesis has now come to present problems to which we shall shortly return. Then Judge Dooling conducted the fifth trial, which resulted in appellants' jury conviction, and which resulted also in some strange new happenings—which, of course, post-dated Judge Weinstein's passage just mentioned. After the jury verdict of conviction in the fifth trial, before Judge Dooling, the Judge entertained, and apparently decisionally committed himself to grant, joint defense motions to upset that jury verdict on grounds of overall constitutional unfairness in the five-trial history; the defendants had sought only a judgment from Judge Dooling setting aside the verdict on these latter grounds, but Judge Dooling went further and issued a proposed memorandum and order (post-verdict) to dismiss the indictment, the implementing of the proposed dismissal order being declared by Judge Dooling to be subject only to the working out of some form or procedure for that dismissal order which would safeguard to the Government an opportunity to appeal. The next familiar history is that the Government sought and obtained a mandamus writ in this Court, ordering Judge Dooling to enter judgment on the jury verdicts and to impose sentence (406 F. 2d 192). The parties then went back before Judge Dooling for the sentencing proceedings which this Court had thus mandated, and at those sentencing proceedings the defendants unavailingly urged Judge Doolings to reconsider his ultimate disposition of the case by eschewing any further thought of indictment dismissal (which this Court had disapproved in the mandamus proceeding), and, instead, to set aside the jury verdict and order a new trial under Rule 33. Judge Dooling denied these latter motions of ours at the

sentencing, on mixed grounds of his feeling bound by the mandamus decision of this Court plus his feeling himself unable to conclude that the fifth trial as such had been in itself (i.e., viewed segregatedly from the preceding four trials) unfair to a degree requiring a new trial.

We respectfully urge the Court to read, in comparative array alongside each other, the transcript of the motion proceedings before Judge Dooling (on the defense post-verdict motions on September 20 and September 27, 1968), the related proceedings before Judge Dooling on October 11, 1968 Judge Dooling's proposed memorandum and order distributed on or prior to October 11, 1968, and the final sentencing minutes of June 6, 1969. In inviting the Court to read these last mentioned papers, the last thing we have in mind is any purpose of invidiousness towards Judge Dooling. We cannot go too far in our sincere expressions, as professional men, of respect and even reverence for Judge Dooling. And yet, we must ask this Court, on this rehearing application, to re-examine the above last cited comparative record materials, in order to bring to this Court's attention the distressing ways in which the course and the chronology of this litigation have tended to stultify the judicial functioning of Judge Dooling in this case.

There comes a time in some litigations, of which this one is an example we think, when counsel have an obligation to "call a spade a spade". The "spade" formulation is here that, in the final, overall impact of the within proceedings, i.e., their impact on the judicial functioning of Judge Dooling, the pressures of appellate minatoriness have turned out to be more than the mortal flesh of lower Court judiciality could bear. At the sentencing proceedings of June 6, 1969, we must regretfully state, a tragic scene was enacted in terms of expected standards of judiciality in a federal District Court. To any experienced lawyer or Judge who reads those sentencing minutes it must quickly become evident that the District Judge had been so hurt, so poignantly hurt, by the recent prior interven-

ing happenings of the mandamus proceedings in this Court, that no one could fairly or humanely expect of that Judge that he would bring his own best stalwart judicial powers to the task which faced him on that day of sentencing. It was the day, as above mentioned, when the defendants were asking Judge Dooling to look back over his own qualms of judicial conscience about the fairness of this fifth trial in relation to the whole ten years history of this case. A reading of those sentencing minutes of June 6, 1969 will reveal, again, that Judge Dooling was at that juncture not in the best command of his really extraordinary usual powers of judiciality—not after this Court's smarting rebuke to him in its mandamus decision (406 F. 2d 192).

A comparative reading of the above cited materials will above all reveal that Judge Dooling, prior to the mandamus decision of the Court, was indubitably convinced of the unavoidable constitutional necessity of succouring these appellants from the oppressions of this fantastically prolonged and relentlessly repeated prosecution, at long last. See the brief for appellant Spero on the original argument herein, at 41-61.

The procedural details of how Judge Dooling (and these appellants) became "boxed into" the situation above adverted to (the sentencing-motion situation of June 6, 1969 when Judge Dooling deemed it impossible to grant some renewed form of post-verdict relief of the appellants even though his whole judicial heart had theretofore cried out in that direction), are naturally beyond the scope of the present page limitations. Illustrative items are: (1) Judge Dooling's references, in his proposed memorandum and order, to the merely "marginal fairness" of the fifth trial, including the Valachi-publicity-jury-prejudice factor, and the question of fairness of the manner in which the Gehring testimony (on the Union Street Nevins Street issue) was received; (2) *the sheer chronological fact that both the pre-fifth-trial proceedings before Judge Weinstein, and this Court's determination*

on the mandamus case, were posited on "constitutional facts" which did not take into account at all the happenings of the fifth trial in itself; (3) the new, prejudicial happenings at the fifth trial, including the Government's non-disclosure of the intended use of the inflammatory witness Valachi, the prejudicial publicity generated by the Valachi episode, the (again) extremely dubious fairness and dubious adequacy of the Union-Nevins proofs at the fifth trial, and the Bruton-questionable character of the Valachi testimony.

We urge that, to this moment, there has not been an adequate, indeed there has not been *any* appellate adjudication, by this Court, of the *overall, combined, cumulative* impact of the history of the five trials, taken all together, on the constitutional rights of the appellants. The mandamus decision of this Court dealt solely with Judge Dooling's evaluation of these constitutional issues as confined within the framework of the narrowly limited "speedy trial" issues which the mandamus Bench deemed were the only issues left open by Judge Weinstein to be decided by Judge Dooling.* Then, in the recent decision of this Court dated April 15, 1970, only two points (insofar as pertinent to the five-trials issue) were decided by this Court, namely, (1) that Judge Weinstein had ruled correctly on the points presented to him (but, we repeat, *those points all factually pre-dated all of the happenings in the fifth trial*, before Judge Dooling), and (2) that Judge Dooling had not erred in declining to set aside the jury verdict on the basis of the happenings in the fifth trial as such (which, *we note, wholly left out of account the inter-relationship between the fifth trial happenings and the happenings over the entire course of the prior four trials*).

Thus, it respectfully seems to us that, in all of the presently governing decisions affecting this matter—this

* To this moment we respectfully fail to understand how this Court in the mandamus case could read Judge Weinstein's plenary order in this narrowed way.

Court's decision of April 15, 1970 on the merits of the appeal from the judgment of conviction, this Court's 1969 mandamus decision, Judge Dooling's several adjudications, and Judge Weinstein's pre-fifth trial determination as to overall constitutional aggrievement—there still abides an entirely *undecided*, by this Court, element of this case, a constitutionally indispensable element that must and has not been decided, namely, whether, tested by overall due process and by overall double jeopardy and by overall cruel punishment considerations, the entirety of these prosecutive proceedings, from the first *through* the fifth trial has satisfied the constitutional tests just mentioned.

If we are correct in our suggestion of this glaring decisional gap in the present appellate posture of this case before this Court, it does respectfully seem to us that rehearing is indicated.

IV. An additional circumstance raising double jeopardy—Judge Dooling's assurance to defense counsel and their clients on October 11, 1968 that no judgment of conviction was going to be imposed by Judge Dooling in this case.

The proceedings before Judge Dooling on October 11, 1968, Tr. 18-19, included a colloquy in which, after Judge Dooling had announced his proposed memorandum and order for dismissal of the indictment, Mr. Kasanof of defense counsel asked Judge Dooling "a question which is a human, practical question, so that I don't make a terrible mistake in my understanding of your Honor's words. Will I be incorrect in telling my client and his wife that your Honor has so far decided that he will not proceed to impose a judgment here, and what remains is the question of the form of the order to protect the Government's potential right of appeal?' The Court: That is right."

We submit that the foregoing constituted, in point of the realities of constitutional fairness, an effectively an-

nounced *judicial decision* by Judge Dooling to the defendants that they might thenceforth deem themselves free of further jeopardy under this indictment. True, when at the subsequent sentencing proceeding in June 1969 this last-suggested interpretation of Judge Dooling's words of October 11, 1968 was recalled to him by defense counsel (Tr. June 6, 1969 11-12, 23-24, 34-36), the Judge disavowed the suggested interpretation, stating that his words of October 1968 had been contingent on the result of appellate review proceedings. But we earnestly submit that such a post-factum interpretation by a trial Judge is not determinative, and may even be wholly without legal significance in circumstances of the kind here presented, from the standpoint of the double jeopardy clause.

May we again refer to our remarks *supra* concerning Judge Dooling's responses at the sentencing (June 6, 1969) to defense counsel's entreaties that the Judge should resolutely carry through to a final decisional form his repeatedly expressed belief that the defendants should not be finally adjudged guilty and sentenced in view of all constitutional circumstances of the case. We believe it is fair to urge that, on October 11, 1968, when Judge Dooling was in effective command of his judicial resoluteness about this case, he *judicially assured* the defendants that they would not be subjected to final criminal punishment in this case, subject only to possible appellate efforts by the Government to sustain the ultimate constitutionality of this overall prosecutive history; and that, at the sentencing on June 6, 1969, Judge Dooling, for the various suggested reasons *supra*, which we respectfully suggest were not reasons comporting with this excellent Judge's usual standards of judiciality, failed to "follow through" on his anterior assurance or promise to the defendants as he denied their renewed motions to set aside the jury verdict; and we urge that this failure by Judge Dooling on June 6, 1969 could not, as a matter of law vitiate his promise or assurance, his *decisional commitment*, which he made to the defendants on October 11, 1969; i.e., *as a matter of the law of double jeopardy*,

Our specific request for appellate-rehearing relief under this heading and the preceding heading (III), then, is that, upon rehearing, the case should be remanded to the District Court with instructions to undertake a renewed consideration of the defendant-appellants' motions in that Court to set aside the jury verdict on all of the constitutional grounds there asserted (which are, in substance, the same constitutional grounds of multiple jeopardy, due process violation and overall constitutional oppressiveness and cruelty arising out of the five trials, the grounds that have previously been presented for appellants in this Court and in the proceedings below); but we also respectfully go further and ask that the case be remanded to the District Court with instructions to consider anew, in light of all the foregoing, the question of whether on October 11, 1968 the District Judge did constitutionally-irretrievably commit himself, as a District Court of the United States, to the setting up of a final, unreviewable right under the double jeopardy clause on behalf of these defendants-appellants.

V. Additional double jeopardy considerations.

Under this heading we call attention to some of the specific unfair impingements of the Government's having subjected these defendants-appellants to a fifth trial.

It is fundamental, in the law of double jeopardy, that governmental prosecutors are not to be encouraged to keep on repeatedly returning to the prosecutive fray in hopes of doing better from repeated trial to repeated trial. This ethical principle of the double jeopardy concept expresses the humaneness of our constitutional standards for the governance of criminal prosecutions. It is one of those downright, traditional decencies which all men instinctively sense, "which all mankind cries out with one voice", in a decent human society.

Regard what happened in this fifth trial and compare it with the ethical axioms just referred to. On the Union-Nevins issue, in this fifth trial, the Government's star witness Mr. Gehring could not remember any more—he had

been testimonially weak even in the fourth trial, several years ago (*supra*). Yet in this fifth trial the Government was permitted to dredge forth Gehring's fourth trial testimony—and for what purpose? To shore up the execrable accomplice-witness Vaccaro. See, again (*supra*) our references to Judge Dooling's own expressions of judicial distaste and remorse over what he allowed the Government to do in this fifth trial regarding the Gehring testimony.

More conspicuously lurid in its prejudicialitiy—but not more prejudicially harmful to the defense than the Gehring-Union-Nevins phase—was the way in which the Government, in this fifth trial, went about bringing into the evidentiary picture the atrocious testimony of Joseph Valachi; we do not further elaborate this Valachi theme here because it was thoroughly briefed on the original argument. But we respectfully re-emphasize that theme now, in this petition, where we are asking this Court to bethink itself, in Panel or *en banc*, of the ultimate issues of constitutional fairness in this case. Lawyers should never preach to Courts, but men of culture, and surely so in our profession, may discourse with each other in words of traditional verities and classic values. May we therefore presume to remind the Judges of this Court of that grand ethical and philosophical phrase of the ancient Romans, the Romans of Catonian virtue, the words *sub specie aeternatis*. When the "crime-hunting" fever of this immediate era shall have cooled, men will hearken again, with gratefulness of heart, to those ancient words, *sub specie aeternatis*.

VI. The Valachi publicity.

We ask that the Panel, or the entire Bench, re-read the transcript of the individualized interrogation of the several jurors. For, we respectfully believe that the selective treatment of this topic in the Court's opinion of April 15, 1970 is not fair to the defendants-appellants, or to the United States Court of Appeals for the Second Circuit.

VII. Valachi's testimony as to Albanese's allegedly false testimony that Vaccaro tried to rape Albanese's wife.

(1) The Court's opinion of April 15, 1970 does not mention that Albanese's wife was unavailable as a witness on the above topic for health reasons (see the within fifth trial record at, e.g., 4120-4121.

(2) The Court's opinion of April 15, 1970 does not treat at all the point that this testimony of Valachi, branding the defendant Albanese with the odious brand of having previously presented a false alibi-type defense which Albanese then ignominously backed away from in this fifth trial, must have had, in the jurors' minds, a destructive effect concerning the indicated guilt of all of the other defendants, not only under the conspiracy count of the indictment, but by inevitable overflow also on the substantive count. Unfortunately, this *Bruton*-hearsay point was not briefed for any of the appellants on the original arguments herein, but it was strongly preserved in the Court below, e.g., Tr. 4433-4434, and see Tr. 9-20-68 at 103-107.

VIII. Curtailment of cross examination.

It respectfully appears to us that this Court's decision in *United States* v. *Marti*, no. 33472, decided February 3, 1970, is incompatible with the Court's decision herein of April 15, 1970, slip op. 2291-2293, concerning the above topic.

CONCLUSION

The appellants respectfuly pray that this petition for rehearing, or for rehearing *en banc*, be granted.

Respectfully submitted,

MAURICE EDELBAUM,
Attorney for Appellant Persico

ROBERT KASANOF,
Attorney for Appellant Albanese

FRANCIS THADDEUS WOLFF,
Attorney for Appellant Spero

EDMUND ALLEN ROSNER
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ABRAHAM GLASSER
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Of Counsel for Appellant Ralph Spero

Dated: April 29, 1970

[MOTIONS FOR STAY OF MANDATE AND CONTINUATION OF BAIL FOLLOW ON NEXT PAGE]

APPENDIX F

Proposed Opinion of Dooling, U.S.D.J.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

60 CR 147

UNITED STATES OF AMERICA,

—against—

CARMINE PERSICO, SALVATORE ALBANESE, RALPH SPERO, HUGH MCINTOSH,

Defendants.

60 CR 147

Appearances:

MAURICE EDELBAUM, ESQ.,
(LAWRENCE K. FEITELL, ESQ., of Counsel),
for defendant Persico

ROBERT KASANOF, ESQ.,
for defendant Albanese

FRANCES T. WOLFF, ESQ.,
for defendant Spero

EDMUND A. ROSNER, ESQ.,
for defendant McIntosh

VICTOR C. WOERHEIDE, ESQ., and
ROBERT M. ORNSTEIN, ESQ., Department of Justice,
(JOSEPH P. HOEY, ESQ., United States Attorney,
of Counsel)
for the Government

DOOLING, *D. J.*

The fifth trial of Counts 1 and 2 of the indictment in the present case ended in verdicts of guilty against the four

defendants whose cases were submitted to the jury. Defendant La Fante, the fifth defendant, acquitted on Count 1 at an earlier trial, had been acquitted on Count 2, the conspiracy count, by direction when the Government rested in the present trial. The four remaining defendants have now moved (a) to set aside the verdicts and dismiss the indictment, (b) to set aside the verdicts and enter judgments of acquittal, Rule 29(c), and (c) for a new trial on the ground that one is required in the interests of justice, Rule 33.

The first trial of the two counts, in May 1961, ended in disagreement; the second trial resulted in June 1961 in convictions of the four moving defendants on both counts and of La Fante on Count 2 only; the convictions were reversed in July 1962, 305 F.2d 534; the third trial, taking place in May 1963, ended in a mistrial as to the defendants Persico, Albanese and Spero, and in a disagreement as to defendants McIntosh and La Fante; the fourth trial, conducted in January-April 1964, resulted in the conviction of the moving defendants on Counts 1 and 2 and of defendant La Fante on Count 2; the convictions were reversed in July 1965, 349 F.2d 6, and the case was remanded for a new trial. The fifth trial commenced on April 3, 1968, and the verdicts were returned on May 9, 1968.

The defendants moved before trial to dismiss the indictment on the ground of the Government's failure to accord them a speedy trial and its failure duly and timely to prosecute the case, and on the grounds that further prosecution would put them in double jeopardy and would violate their rights to due process through oppressive re-trial; and they moved also that the Court enter an order barring further prosecution in the interest of justice; defendants moved to dismiss also on the ground that to subject the defendants to a fifth trial would constitute cruel and unusual punish-

ment. The motion was denied with leave to renew it at trial. The Court noted that, although the first six months of delay was due to governmental indecision, responsibility for the rest of the delay was not clearly assessable, both sides had acquiesced in repeated calendar postponments, defendants never moved for a speedy trial, and defendants showed no loss of witnesses or change in available evidence after the reversal and remand for a new trial that would make the trial more difficult. The Court appeared to condition the right to effective renewal of the motion on a showing of loss of witnesses or of available evidence after remand. The test that will be applied, however, will not be so limited; it cannot be supposed that the mandate of the Court of Appeals was so much an unconditional and affirmative direction to conduct a new trial as it was a refusal to dismiss the indictment as an incident to reversing the judgment, leaving to the trial court the question of the propriety of a new trial in the circumstances shown to exist when the case was moved for trial. The Court of Appeals dealt with a record that closed with the verdict of April 24, 1964, and the sentences of June 19, 1964.

The principal contentions made on the motions revolve around the "surprize" calling of Joseph Valachi as a witness, the effect on the fairness of the trial of the large-scale publicity that followed, the admission through Valachi of prejudicial testimony picturing certain of the defendants as engaged deeply in hijacking and integrated in a Cosa Nostra "family," the allegedly fatal unfairness to the other defendants, by the rule of *United States* v. *Bruton*, 1968, 391 U.S. 123, that followed from Valachi's testimony against Albanese and Persico, and the unfair curtailment, by the rule of *Smith* v. *Illinois*, 1968, 390 U.S. 129, of the cross-examination of Vaccaro and Cancelli. Other points, less general in their application, are advanced by defendant

Spero. In addition the grand and petit juries are challenged as having been improperly selected.

The points now made were all canvassed thoroughly during trial and in the extended oral argument of the present motions, and elaborate treatment of them at this time cannot be useful, so long as the decision being made is clear.

The Government had the right to call Valachi as a witness if satisfied that he had relevant and competent testimony to offer, and if confident that it was not suborning perjury. If, as seems to be the case, it was the words of one of defense counsel spoken on January 6, 1964 (and not Valachi's senate sub-committee testimony), that first indicated to Government trial counsel that Valachi could testify to a Persico admission, then Government counsel were right to track the lead down. Having done so, through special agents, on October 11, 1967, their proper concern was to determine that what Valachi said was not a recent fabrication. No prior consistent statement was ever produced, and fabrication remained a lively suspicion to the end, given Valachi's background, his record and his determined negotiation of better living conditions as the price for his agreeing to testify.

At present there is no requirement that Government disclose its witnesses in advance of trial, although that is hardly a jewel in the crown of criminal justice, and it is inferentially condemned as less than fair by the statute that has long required the furnishing of a list of witnesses in capital cases. 18 U.S.C. § 3432; *cf. Gregory* v. *United States*, D.C. Cir. 1966, 369 F.2d 185, 187-189; Orfield, List of Witnesses and Jurors in Federal Criminal Cases, 1968, 44 F.R.D. 527. There is a general duty of fairness owed by all counsel when they make statements in open court in response to opposing counsel's requests. Government counsel spoke in open-ended terms of the witnesses that he might

call, but he did not disclose that he might well call Valachi, and it is very difficult to see how even a suspicious adversary could have anticipated that Valachi would be called.*

Government counsel's belief—well or ill-founded—that disclosure might imperil Valachi's security, explains the non-disclosure adequately enough; the delay allowed to enable the defense to prepare to attack Valachi's testimonial competency and to cross-examine him redressed the surprise amply. The argument that disclosure would have resulted in a different composition of the jury has no measurable legal content and is rejected. The weightier point is that disclosure would have made it possible to select a jury willing to be sequestered throughout the trial or to take other measures. In retrospect, the Court would have been well-advised to act on its own initiative by recommencing the trial with a sequestered jury when, late on April 4, it was asked to sign a writ for Valachi's production. Non-disclosure to defense counsel precluded their moving for such relief. No action was taken, and, partly in consequence, the publicity reached the jury.

The publicity was certainly, by legal standards, prejudicial matter. No doubt many judges would unhesitatingly have declared a mistrial, and would now set aside the verdict. Much depends here on the nature of the issue tried, the atmosphere of the trial, the nature of the publicity, and its apparent effect on the jury. The issue, despite the many trials, was concise, single and simple. The court room atmosphere while the jury was present was, on the whole, even and temperate throughout; substantially all of the sharp clashes between counsel occurred when the jury was absent. The publicity did not relate to guilt of the crime

* The statements in Persico's Point I on the present motion about the judge's knowledge of the intention to call Valachi are wrong in fact. The judge did not hear of Valachi until after the session of April 4.

for which defendants were on trial, but it did picture certain of them as criminals and may be supposed by supplying unsworn assertions of criminal propensity, to have been relevant and prejudicial. (An unfortunate slip, in no way traceable to Government counsel, had disclosed to the jury that one defendant had been in prison with Vaccaro before the Akers hijacking.) The jury's reaction to the publicity, if reliance is placed on the interrogation of them, was, if somewhat guardedly disclosed, not such as to convey the impression that the jurors would not fairly try the concise issue before them.

There is no factual basis for the argument that the defendants were already notorious and hence inevitably exposed to the sort of publicity that occurred in consequence of calling Valachi. That argument assumes that if the publicity is so damaging as to have jeopardized the fairness of the trial, it must nevertheless be tolerated if it is an inevitable concommittant of the public characters the defendants have created for themselves, and if it would be present in any trial of them at any place. Assuming the premise, the defendants bore no such public character. The jurors had never heard of them before trial.

The fairness issue must be decided within the four corners of the trial itself, and the impact of the publicity on the trial. On that basis it is concluded that the publicity did not destroy the fairness of the trial. No consideration has been given to the allocation of responsibility for the way in which the matter was handled on the day that Government counsel informed defense counsel that the next witness would be Valachi. Acting, as all participants were, under the confused pressures of the moment, it does not in retrospect appear that any participant acted in a way calculated to prevent, or to contain the effect of, the then anticipated publicity.

Proposed Opinion of Dooling, U.S.D.J.

Counsel argue that not to set aside the verdict is "to place a confidence in the effect of curative instructions which is now constitutionally impermissible" under *United States* v. *Bruton*, 391 U.S. 123, 126-128, 137. But *Bruton* put its refusal to approve the constitutional adequacy of the limiting instructions there involved on the ground that such instructions are not an adequate substitute for the constitutional right to cross-examine one who has asserted that the defendant participated in the crime for which the confessing and accused men are standing trial together. The argument has no application to instructions the sole mission of which is to keep the focus of the jury's attention on the admissible evidence relevant to the issue of guilt. Such instructions are cognate to those given in every case in which prejudicial evidence is stricken and, more, in every case in which a defendant ex-convict testifies and is protected only by instructions on the limited effect to be given to his prior convictions. Indeed the instructions in such a case as the present one are easier to follow, and have a manifestly greater appeal to reason and fairness than instructions which permit the jury to consider prior convictions on the issue of credibility but not on the lurking issue of criminal propensity.

Valachi's testimony (Tr. 2759 *et seq.*, particularly Tr. 2780-2781, 2786-2793; 2951 *et seq.*; limiting instruction, Tr. 2948-2950) was that Albanese had told Valachi that he had participated in the Akers hijacking (Tr. 2786), and, that by Albanese's own procurement, Albanese's wife had falsely testified at a 1961 trial (in order to discredit Vaccaro) that Vaccaro had made an indecent approach to her (Tr. 2788); he testified also that Persico in the presence of Albanese and McIntosh, implicitly stated that he had pulled the Akers hijacking for which he was then on trial (Tr. 2792). This directly relevant testimony came out embedded in a

broader recital that made the Akers hijacking one in a series; Persico was described as complaining that, under protest, he had been paying a "tax" on all of them to Profaci; Persico ("Junior") was portrayed as seeking the advice of Valachi as an elder statesman about the propriety of Profaci's tax (Tr. 2791-2793). Valachi did not bring up the supposed Gallo-Profaci war, or the murderous violence it allegedly involved. It is useless, again, to try to determine responsibility for the form the testimony took. All were aware of the shape it might take, and the courses pursued in this foreknowledge are plain on the record. There is great force in Government counsel's argument that in the immediate context of the present case the "other crime" and "criminal propensity" aspects of Valachi's recital were shorn of their usual objectionable nature because they accompanied directly relevant and damnatory evidence which if believed, rendered the remoter inference of probable guilt (from the reference to other crimes) meaningless and pointless. If Valachi was not believed on the directly-relevant points, again, on the argument, the "other crimes" material will necessarily have altogether lost its prejudicial efficacy as inducing an unwarranted belief in the defendants' guilt of the main offense. And, in addition, the case for the relevancy and admissibility of all that Valachi said is far from slight; similar crime evidence has a place in the law; Vaccaro's testimony was alive with implications of a course of hijackings, and the Albanese and Persico admissions of repetitious involvement tended to corroborate Vaccaro generally by offering a background explanation for what otherwise seemed an over-elaborate and over-populated program for hijacking one Akers truck.

That Valachi's testimony was suspect, and manifestly so, appeared not only from its late appearance and the circumstances in which it became available, but from the very

grave doubt that the substance of it could have been (as Valachi intimated) disclosed to Agent Flynn when Valachi first began to cooperate, and not have been recorded somewhere by Agent Flynn, or in some form transmitted through Agent Flynn to the United States Attorney (Tr. 2860, 2908-2909, 2914-2915, 2964; 2965-2979; particularly 2977-2979). The countervailing factor relied on by Government counsel —that presumably informed defense counsel first alerted the Government trial counsel to the existence of a Persico admission in Valachi's memory—was not known to the jury. The Valachi testimony was violently attacked on all the available grounds; the value that the jury put on it is necessarily unknown.

Defendants claim that the principle of *Bruton* v. *United States* was transgressed by allowing Valachi to testify as to the Albanese and Persico admissions and by his testimony implicating the defendants in other hijackings. The point is particularly available to Spero and McIntosh who were not accused by Valachi but who may have suffered by Valachi's broad-brush testimony implicating McIntosh certainly in an appearance (along with Albanese) of subordination to Persico in the Profaci "family," and who may also have suffered (if Valachi was believed) by the corroboration of Vaccaro's testimony so far as it incriminated Persico and Albanese. Spero's counsel points out that *People* v. *Pilon*, 3rd Dept. 1968, 30 App. Div. 2d 365, applied *Bruton* broadly to require a reversal and severance essentially on the ground that limiting instructions do not protect a defendant against whose co-defendants much damaging evidence is admissible which does not reach the defendant seeking severance, particularly where the competency of evidence to corroborate certain accomplice evidence depended on the jury's first deciding that the alleged corroborating witness was not, rather, a second accomplice.

Proposed Opinion of Dooling, U.S.D.J.

No doubt much will flow from *Bruton* in the consideration of pre-trial motions for severance. But the Court in *Bruton*, 391 U.S. at 133-134 and footnote 10, 135 does not hold nor does it imply that joint trials are at an end wherever there is a confession; the point is not to infringe a non-confessing co-defendant's right of confronting his accuser, and in this case the admissions did not accuse co-defendants. Valachi's testimony, if believed, certainly showed Albanese and McIntosh acting as subordinates to Persico and treating Valachi as a competent adviser. That testimony was, however, directly descriptive of the observed acts of Albanese and McIntosh and Valachi could be fully cross-examined about what he saw and what obedience to Persico's command he observed; the testimony did not relay to the jury words of a non-testifying Persico that accused Albanese and McIntosh of complicity in the crime.

The *Bruton* point, at its strongest when made by Spero, had no validity when made by McIntosh and Albanese. If they are not taken to have admitted complicity by their silence—and that was ruled out, without exception, in the instructions (Tr. 2948-2950, 4510-4512)—they were not accused by Persico and had no need to cross-examine him.

It is argued, under *Smith* v. *Illinois*, 1968, 390 U.S. 129, that defendants were denied the right to cross-examine Vaccaro and Cancelli because neither witness was required to state his residence or certain other background data. In each case the ruling was based on the conclusion that the witness was in fact in fear of reprisal, whether there was a foundation in fact for his fear or not. *Smith* v. *Illinois* did not present that situation, and Mr. Justice White, concurring, expressed his understanding of the Court's opinion as not inconsistent with his view that the rule of *Smith* v. *Illinois* does not warrant questions that merely harass, annoy or humiliate the witness, or justify inquiries which

tend to endanger the personal safety of the witness. Here, the witnesses came forward with reasons for being excused from answering the questions. Moreover, Vaccaro was a witness for the fifth time and evidently known to the defendants. Cancelli was a witness for the second time and he was evidently known to defendant Spero. In the total circumstances *Smith* v. *Illinois* did not require answers to the background questions and the total circumstances indicate that the questions were not pressed in aid of effective cross-examination.

Much is made of the excusing of Juror No. 1 during trial, after hearing, and on a ground that would appear to be entirely proper. *United States* v. *Zambito*, 4th Cir. 1963, 315 F.2d 266, 269; *cf. United States* v. *Ellenbogen*, 2d Cir. 1966, 365 F.2d 982, 989; *United States* v. *Houlihan*, 2d Cir. 1964, 332 F.2d 8, 12-13; *United States* v. *Goldberg*, 3rd Cir. 1964, 330 F.2d 30, 42-43; *United States* v. *Gottfried*, 2d Cir. 1948, 165 F.2d 360, 365. The hearing produced no remotely credible suggestion of prejudice, and the extent and extravagance of the statements made went so far beyond the bounds of reasonable advocacy as to throw doubt on the extent to which reliance could be placed on counsel's elaborate arguments in other contexts. The excusing of the jurors and the substitution of alternates was without incident. Tr. 3988-3992.

The challenges to the selection of the grand and petit juries must fail on the facts. There can be no finding, on the evidence presented, of systematic exclusion of any definable class, or systematic over-representation of any definable class, or of an evident departure from the standards of 28 U.S.C. § 1861. The testimony, rather, indicated a responsible and unbiased effort directed solely to choosing persons who could be expected to render the "efficient jury service" visualized by Section 1861. Paying attention to

years of schooling, job stability, and job responsibility is not concentrating on irrelevant juror characteristics as a means of imparting an impermissible bias to the jury list (as in *Rabinowitz* v. *United States*, 5th Cir. 1966, 366 F.2d 34, *cf. United States* v. *Henderson*, 7th Cir. 1962, 298 F.2d 522), nor can it be shown to impart an income-level, racial, or geographic bias to the jury list, or a social-class bias.

Merging of the grand and petit jury lists, both originally drawn from the voter registration lists, resulted in the appearance of many persons in the panel who had served on grand juries once or repeatedly. That service did not disqualify them. However, since defense counsel appear rather generally to challenge grand jurors *qua* grand jurors, and the experience of working with the merged list was new to defense counsel, additional challenges were allowed for use against those who had grand jury service so as to leave the defendants free to use their base challenges against the others called into the box.

The cumulative effect of the trial, its difficulties, its interruptions and skirmishings is extremely difficult to assess for that overall fairness which, as the Court of Appeals has indicated, is peculiarly required in this case (305 F.2d at 536). It would be easy enough to say that while no one ground of objection is sufficient, the aggregate have a sufficient synergic effect to require setting the verdict aside. Yet it is very hard at the end to efface a sense that defense counsel often courted unfairness, and dilated on even slight episodes with every trope in the advocate's repertoire as a means of creating a cumulative impression that the trial was breaking down, that the scene was being inundated in unfairness. Yet recollection and consideration of what went on before and with the jury does not bear that out. The publicity alone presents the genuine fairness issue so far as concerns matter not part of the trial evidence.

Nevertheless, the elements of basic unfairness were present in the fearful terms on which Vaccaro's evidence was obtained, and in the unlovely bargaining with Valachi for his testimony. Courts are far too reluctant to face the implications of governmental use of the testimony of "cooperative" co-defendants and kindred testimony; it may reflect an unarticulated conviction that the entire fifth amendment, confrontation, burden-of-proof and presumption-of-innocence syndrome is so far displaced from the range of contemporary analyses of the sociological frame of reference of common crime and the role of "penology" that the constitutional imperatives of criminal procedure must be compensated for by these otherwise intolerable compromises. There is more than a disturbing doubt, too, that Gehring's possibly very important testimony about the location of the "straight job" on the critical morning was not fairly presented. (Tr. 3725, 3727, 3732-3733, 3734, 3735, 3755, 3756, 3757, 3775, 3781-3792). The Government's summation, powerful, well organized and presented with great force, needlessly transgressed allowable limits at several points [Tr. 4366, 4386 (failure of defendants to contradict Vaccaro's testimony), 4443-4446, 4468, 4470-4472]. Yet the dubious circumstances of the presentation of the Gehring evidence became in at least one sense immaterial since the prior trial testimony was in the end received as such on the ground that Gehring was, as to that part of his evidence, unavailable through collapse of recollection. The charge was generally acceptable to both sides and appeared to present the issues to the jury in a proper way (except, perhaps, as to Tr. 4515, see Tr. 4528-4530). The jury, left with all the evidence and argument, had nothing of substance to marshal against the Government's elaborated evidence. The jury's task was to weigh that evidence for its probative force, and it was found sufficient. That result

is unchallengeable purely as a matter of evaluating formally sufficient evidence. The detail and circumstantiality of the Government's evidence have predictably turned out to require something more than attacks on credibility, no matter how forceful. The nature of the Government's proofs multiplied points of possible contradiction, yet nothing of substance was brought forward.

The final question, then, is whether even if the verdict may not be set aside on the basis of matters intrinsic to the trial and its immediate setting, the indictment must be dismissed in the light of the trial considered in its entirety on the grounds urged before Judge Weinstein and reserved by him for reconsideration at trial time. The specific circumstances of disadvantage which defendants advance as related to delay are not impressive. A dubiously useful witness called by Albanese at earlier trials died in December 1967, and it is said, although not very persuasively, that the death made it hopeless —in the face of Valachi's new testimony—to press the defense that Vaccaro was motivated in his testimony by a wish to revenge himself on Albanese. Possible witnesses, disclosed in an FBI memorandum, to the time when the hijacked truck was first observed standing empty on the street had disappeared; but the memorandum itself was received in evidence. Gehring's failure of recollection between 1964 and 1968 impaired counsel's opportunity to cross-examine him in the most effective manner. The trial related to an episode that had occurred nearly nine years earlier. After four trials within the three year period May 1961 to April 1964, the fifth trial was not commenced until over four years after the last preceding trial commenced. Testimony, in such a setting

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* Defense counsel argues that use of the dead man's testimony as given in a prior trial would be an inadequate means of matching the dead man's credibility against Valachi's *viva voce* testimony.

is arguably a feat in recalling earlier testimony rather than the facts; consistency not truth arguably becomes the testimonial goal.

After remand, nothing occurred in the case for six months. After some desultory proceedings in January, on one date in March, and on three dates in April 1966, again nothing occurred until June 2, 1967. Starting in June 1967 a number of matters relating to bail and the assignment of counsel were dealt with and the case was put over until September 1967. Again in September 1967 matters relating to the assignment of counsel and to bail came up, the trial was twice postponed, and on October 9, 1967, it was marked ready and passed. On October 26, 1967, the first motion to dismiss was filed. The delay from that date until the trial commenced cannot be considered to any degree avoidable, given the fact that there were five separately represented defendants, all busy in the Courts, two of them new to the case, and two of them assigned counsel. The critical time lapses after affirmance were not justified and were not occasioned by acts of the defendants. Their result has been that a case in which the statute of limitations would have expired in 1964 was tried, and for the fifth time, nearly four years later, in 1968.

The salutary principle of *United States* v. *Tateo*, 1964, 377 U.S. 463, 466, that the governmental right of re-trial serves the interests of society and of defendants by assuring rigorous review of trials on defendants' appeals without putting the guilty beyond reach of conviction at a fair retrial if an earlier trial fails for a defect in the manner in which it is conducted, must acknowledge some outer limit dictated by due process fairness; so too, some due process limit must be recognized as hedging in the governmental right to suffer so long as it does not procure delay in criminal retrial (*cf. United States* v. *Ewell*, 1966, 383 U.S.

116); *Pollard* v. *United States*, 1957, 352 U.S. 354, does not establish an affirmative principle that the speedy trial requirement is not transgressed, in the absence of defense insistence on prompt retrial, unless it can be shown that there is governmental delay that is "purposeful or oppressive." The double jeopardy and speedy trial rights are certainly limited by the societal interest in fair and workable law enforcement and prosecutorial procedures.

It is concluded that the history of the present case through the date of verdict in the fifth trial, including the merely marginal fairness of the fifth trial, reflects transgression of the due process limitations upon the governmental rights of retrial and orderly deliberateness in seeking retrial. *Cf. Ross* v. *United States*, D.C. Cir. 1965, 349 F.2d 210; *Hardy* v. *United States*, D.C. Cir. 1967, 381 F.2d 941, 948 fn. 35; *United States* v. *Parrott*, D.C.D. 1965, 248 F.Supp. 196. Note *Petition of Provoo*, D.Md. 1954, 17 F.R.D. 184, aff'd, 1955, 350 U.S. 857. It is not suggested that the subtraction of a single element of the whole history through the time of the rendition of the verdict would not require, or at least justify, a different result. It is held that the aggregate here has reached the point at which to enter judgments of conviction against the defendants would be to deny them due process.

On these grounds it is concluded that Counts 1 and 2 of the indictment must be dismissed by appropriate order as to the moving defendants.

Brooklyn, New York
October 11, 1968.

JOHN F. DOOLING, JR.
U.S.D.J.

APPENDIX G

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 311—September Term, 1968.

(Argued December 20, 1968 Decided January 21, 1969.)

Docket No. 33019

UNITED STATES OF AMERICA,

Petitioner,

—v.—

HONORABLE JOHN F. DOOLING, JR., United States District Judge for the Eastern District of New York,

Respondent.

UNITED STATES OF AMERICA,

—v.—

CARMINE PERSICO, SALVATORE ALBANESE, RALPH SPERO, HUGH MCINTOSH,

Defendants.

E. D. N. Y. 60 Cr. 147

Before:

LUMBARD, *Chief Judge*,
MOORE, *Circuit Judge* and RYAN, *District Judge.**

Petition by the Government for a writ of mandamus directing the United States District Court for the Eastern

* Sitting by designation.

District of New York, John F. Dooling, Jr., *J.*, to sentence defendants and enter judgment upon guilty verdicts returned by a jury on May 9, 1968. Judge Dooling had distributed to the parties a proposed memorandum and order dismissing the indictment on the ground that the four previous trials of the defendants, together with the "merely marginal fairness" of this fifth trial, violated due process. The Court of Appeals, Lumbard, *Chief Judge*, issued the writ, holding that a district court judge does not have the power to dismiss an indictment after the return of a verdict of guilty upon grounds which were in part considered and rejected without leave to renew before trial by another district judge.

Writ issued.

VICTOR C. WOERHEIDE and ROBERT M. ORNSTEIN, Department of Justice, *for petitioner.*

MAURICE EDELBAUM, *for defendant Persico.*
ROBERT KASANOF, *for defendant Albanese.*
FRANCES T. WOLFF, *for defendant Spero.*
EDMUND A. ROSNER, *for defendant McIntosh.*

LUMBARD, *Chief Judge*:

The government's petition for a writ of mandamus and/or prohibition raises the novel question whether a district judge has the power to dismiss an indictment, after a jury has returned a verdict of guilty, on the ground that there has been a "transgression of due process," even though the trial itself was fair and the evidence supports the verdict.

We find that the district judge lacks the power to dismiss the indictment for the reasons he has given. In the exercise of our supervisory power over the administration of justice we grant the petition and direct that sentences be imposed and that judgment be entered upon the verdict of the jury.

Consideration of the government's application requires examination of Judge Dooling's intended action in the light of the lengthy history of this prosecution, including the conduct of this latest trial.

The four defendants involved in this proceeding—Carmine Persico, Salvatore Albanese, Ralph Spero, and Hugh McIntosh—were indicted in April 1960 for conspiracy to hijack and for hijacking a truck transporting goods in interstate commerce in violation of 18 U.S.C. § 1951. To date there have been five trials based on this indictment. The first trial, in May 1961, ended in a jury disagreement. A second trial followed immediately and in June 1961 the four present defendants were convicted on both counts.[1] We reversed those convictions in July 1962 because of errors at trial. 305 F. 2d 534. The third trial the following spring of 1963 was aborted by mistrial as to Persico, Albanese, and Spero, after eight days of trial, and by a second hung jury as to the other defendants. The fourth trial lasted from January to April 1964 and resulted in the conviction of all defendants. The appeal was argued in March 1965; after reviewing the record of 9,595 pages we reversed again in July 1965, 349 F. 2d 6, because of errors in the trial judge's charge and remanded for a new trial.

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[1] One Magnasco was convicted on both counts, but was shot and killed prior to sentence. A co-defendant LaFante was convicted on the conspiracy count only. At the conclusion of the government's case in April-May 1968 trial Judge Dooling directed LaFante's acquittal for lack of sufficient evidence.

Prior to the fifth trial the defendants moved to dismiss the indictment on the grounds that the repeated trials, and the delay in prosecution of two and one-half years following our reversal in July 1965 of the fourth trial's verdict, seriously prejudiced defendants, violated their right to a speedy trial, and constituted cruel and unusual punishment. Judge Weinstein, upon full argument by both sides, denied the motion. He pointed out that the government alone was responsible only for six months of the delay occurring after our reversal, and that at no time since this date had defendants made a definite motion for a speedy trial. See *United States* v. *Lustman,* 258 F. 2d 475, 478 (2d Cir.), cert. denied 358 U.S. 880 (1958); *United States* v. *Kaufman,* 311 F. 2d 695, 698 (2d Cir. 1963). Defendants also had made no suggestion that their trial burden had become more difficult because of the loss of any evidence or witnesses since July 1965. In the absence of a showing of prejudice because of the delay and repeated retrials Judge Weinstein permitted the fifth trial to proceed, but granted defendants the right to renew their motion "at the trial" if "on the retrial of the case, it should appear that there was such prejudice. . . ."

The fifth trial commenced before Judge Dooling, in April 1968. The motions made before Judge Weinstein were renewed by defense counsel before trial commenced, at the close of the government's case, and at the close of the case before the charge to the jury. On each occasion Judge Dooling denied the motions. Transcript pp. 199, 371, 4195.

Throughout this period Judge Dooling was fully informed of those respects in which defendants claimed that they had been prejudiced by the delays and repeated mistrials, and he seems to have remained consistently unimpressed by these arguments.

Verdicts of guilty were returned by the jury on May 9, 1968. On June 24, 1968, the defendants jointly moved for alternative relief: (A) to set aside the verdict and dismiss the indictment; (B) for entry of judgment of acquittal as to each and all, and (C) for an order granting a new trial. The motion papers set forth 17 reasons why relief should be granted; 13 of these referred to alleged errors regarding evidence at the trial and the conduct of the prosecutor.

Judge Dooling reserved decision on these motions, and there was no further action taken on the case until October 11, 1968. On that date the Judge distributed to all parties copies of a memorandum and order which he intended to enter dismissing the indictment. He indicated that he would not file the order, however, in order to allow government counsel an opportunity to suggest modifications in the form of the memorandum which would allow the government to appeal from his action. The government chose to seek mandamus from this court ordering Judge Dooling to enter judgment on the verdicts and impose sentence. Judge Dooling entered no appearance in these mandamus proceedings, but the legality of his order was urged by counsel for all four defendants in briefs and oral argument.

We turn first to the propriety of Judge Dooling's proposed action.

The bulk of the memorandum before us carefully analyzes a variety of objections raised by the defense concerning the conduct of the trial. The most serious of these revolves around the appearance of the well known Mafia informer Joseph Valachi as a prosecution witness. Valachi had not testified at any of the four previous trials, and the defense was not informed of his appearance in this trial until shortly before he was called. While defense counsel objected to this element of surprise, and also to the admis-

sion of portions of Valachi's testimony, their major emphasis in the post-verdict arguments was on the prejudicial publicity which was occasioned by Valachi's appearance and which reached the jurors through the newspapers. In his opinion Judge Dooling manifests considerable concern over his own handling of this matter; in retrospect he states the view that "the Court would have been well-advised" to begin the trial anew after the Valachi episode with a sequestered jury.

Despite his doubt, Judge Dooling concludes that the Valachi testimony "did not destroy the fairness of the trial." He also rejects each and every one of the defendants' other arguments centering on alleged defects in the trial. He finds that the verdicts were supported by sufficient evidence.

Despite finding no ground upon which the jury verdicts can be set aside the court then goes on to consider the motions made before Judge Weinstein relating to the possible prejudice arising from the retrials and the delay before the fifth trial. He finds that "the specific circumstances of disadvantage which defendants advance as related to delay are not impressive." But this observation does not, as one might expect, end the case. Judge Dooling goes on to consider the arguments concerning delay and retrial which did not turn upon a specific showing of prejudice, and which Judge Weinstein had rejected before trial without leave to renew. Reviewing the exact same facts previously passed upon by Judge Weinstein the court finds that the "critical time lapses" occurring before the fifth trial "were not justified and were not occasioned by acts of the defendants." The court then states its holding:

> "It is concluded that the history of the present case through the date of verdict in the fifth trial, including

> the merely marginal fairness of the fifth trial, reflects transgression of the due process limitations upon the government rights of retrial and orderly deliberations (sic) in seeking retrial. . . . [cases cited] It is not suggested that the subtraction of a single element of the whole history through the time of the rendition of the verdict would not require, or at least justify, a different result. It is held that the aggregate here has reached the point at which to enter judgments of conviction against the defendants would be to deny them due process."

It is apparent from the court's memorandum that the proposed dismissal of the indictment is not based on the powers conferred on the district courts by the Federal Rules of Criminal Procedure. The court relies on none of the Rules in its memorandum, and its findings of fact and law, the correctness of which is not now before us, indicate its belief that the Rules do not sanction its proposed action.

The only Rule which conceivably could be read as authorizing the dismissal of an indictment under the present circumstances is Rule 48(b):

> "If . . . there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information, or complaint."

The Rule implements the right to a speedy trial guaranteed by the Sixth Amendment. *Pollard* v. *United States*, 352 U. S. 354, 361 n. 7 (1957); *Fleming* v. *United States*, 378 F. 2d 502, 503 n. 3 (1st Cir. 1967). It seems doubtful that this Rule contemplates the dismissal of an indictment after the conclusion of a trial and the return of verdicts of guilty, but there is no need to resolve this question for present purposes. There is no doubt that before Rule 48(b) can be

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* "Deliberateness", in Judge Dooling's memorandum.

invoked there must be a showing that the delay prejudiced the defendant's ability to rebut the government's case, or that the delay was caused by oppressive governmental action. See, *e.g.*, *Fleming* v. *United States*, 378 F. 2d 502, 504 (1st Cir. 1967); *United States* v. *Bennett*, 364 F. 2d 499, 500 (2d Cir.), cert. denied 386 U. S. 917 (1966); *United States* v. *Sanchez*, 361 F. 2d 824, 825 (2d Cir. 1966); *United States ex rel. Von Cseh* v. *Fay*, 313 F. 2d 620, 624 (2d Cir. 1963). In his memorandum Judge Dooling specifically finds that the claims of prejudice by the defendants are "unimpressive," and impliedly holds that the delay was not "purposeful or oppressive." These facts, together with his affirmative statement that his action is taken on "due process" grounds, demonstrates that Judge Dooling does not regard Rule 48(b) as authorizing the dismissal of this indictment.

It is equally clear that Judge Dooling does not propose to act under Rule 29 or Rule 33, both of which allow a trial judge to set aside a verdict of guilty. Rule 29 authorizes this action, together with the entry of a judgment of acquittal or the ordering of a new trial, only when the evidence is insufficient to support the verdict, a finding which Judge Dooling rejects in his opinion. Rule 33 empowers the court to order a new trial "if required in the interest of justice." Judge Dooling found that the trial of the defendants was fair, although from his opinion it is evident that he has entertained some doubts on this score. We must read his proposed memorandum and order, which would dismiss the indictment rather than order a new trial as allowed by Rule 33, as a denial of the defendants' motion for a new trial.

Since the Federal Rules provide no basis for the court's proposed action it must find its justification, if any, in the inherent power of a district court "to do justice."

United States v. *Apex Distributing Co.*, 270 F. 2d 747, 756 (9th Cir. 1959); *O'Neal* v. *United States*, 272 F. 2d 412, 413-14 (5th Cir. 1959); see *United States* v. *Heath*, 260 F. 2d 623, 632 (9th Cir. 1958); *United States* v. *Kane*, 243 F. Supp. 746, 752 (S.D.N.Y. 1965). But whatever may be the scope of this power, in our view the proposed action of the court is not supported by any findings made in its memorandum, but rather only by conclusions stated in general terms.

In final analysis his conclusion is not based on any ruling regarding the matters left open by Judge Weinstein, but rather, it would seem, upon the court's own sense of uneasiness because of doubt that the trial has been fair. In such event the proper course for the trial judge would have been to confess his own errors and grant a new trial: it does not lie in his power to put an end to the case by dismissal because of vague and unsubstantiated doubts. The proposed action is without precedent, and we believe it would seriously disrupt the prompt and efficient administration of criminal justice.

The court cites four cases as analogous support for its proposed order dismissing the indictment, but they have little relevance. In *United States* v. *Parrott*, 248 F. Supp. 196 (D.D.C. 1965), and *Petition of Provoo*, 17 F.R.D. 184 (D. Md. 1954), aff'd 350 U.S. 857 (1955), the district courts dismissed indictments *before* trial had begun, and upon showings that the defendants had been prejudiced by the delays in prosecution. The holding of the Court of Appeals in *Ross* v. *United States*, 349 F. 2d 210, 215 (D.C. Cir. 1965), reversing a conviction in the exercise of its supervisory power over the district courts, also was based on a finding of prejudice. See *Hardy* v. *United States*, 381 F. 2d 941, 943 (D.C. Cir. 1967).

Rule 12(b)(2) of the Federal Rules provides:

> "Defenses and objections based on defects in the institution of the prosecution or in the indictment or information . . . may be raised only by motion before trial. . . ."

The defendants did make their motions in a timely manner before Judge Weinstein. Rule 12(4) governed the disposition of the motions by Judge Weinstein:

> "A Motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue."

The evident purpose of these two provisions of Rule 12(b) is to encourage the disposition before trial of as many motions as possible which challenge the right of the government to continue a prosecution. Obviously this practice is greatly preferable to considering such a motion only after the completion of a lengthy trial. But Rule 12(b)(4) recognizes that occasionally a decision must be postponed until trial, since the merits of the motion may depend on facts which will not be developed until witnesses are called and evidence is introduced. Thus Judge Weinstein, while denying the motions for dismissal before trial, acknowledged the possibility that events at trial might reveal that the delay in prosecution had indeed prejudiced the defense, even though no prejudice was apparent on the record before him. He therefore granted defendants leave to renew their motions at the trial if, and only if, "on the retrial of the case, it should appear that there was such prejudice." Except as revived by such a showing of prejudice the defendants' motions to dismiss the indictments were "determined before trial," and could not thereafter be entertained by a

district judge without doing violence to the interests of judicial economy furthered by Rule 12(b)(2) and (4).

Yet this is just the action threatened by the memorandum and order before us. The claims of prejudice through delay are still found to be "unimpressive," yet the motions to dismiss the indictment are about to be granted on the grounds rejected, without leave to renew, by Judge Weinstein before trial. This dismissal, after a five week trial during which no right of the defendants is found to have been violated, would result in a shocking waste of jury and court effort. Judge Dooling had ample discretion to take appropriate action *during the trial* to protect the rights of the defendants, including their right not to suffer serious prejudice because of the delays and the number of retrials which have occurred over the course of this prosecution. And, of course, upon appeals from convictions this court will review the propriety of Judge Weinstein's original ruling. Judge Dooling's ruling that events at the trial did not demonstrate that defendants had been seriously prejudiced by the delays before trial, and any other rulings which denied properly preserved objections to the conduct of the trial itself. The existence of these avenues of redress for the defendants eliminates any need for the existence of a power in the trial court to dismiss an indictment, after the return of guilty verdicts, on grounds rejected before trial. The exercise of such a power by a district judge would interfere seriously with the proper prosecution of criminal cases in the federal courts.

We think the remedy for the proposed dismissal of the indictment by the district judge which we have found to be beyond his power is to issue the writ of mandamus prayed for by the government and direct the district judge to proceed to sentence the defendants and enter judgment on the verdict of the jury.

Mandamus is an extraordinary remedy, and is appropriate only where there are "exceptional circumstances amounting to a judicial 'usurpation of power.'" *Will* v. *United States*, 389 U.S. 90, 95 (1967). Its use in aid of the lawful rights of the government in the prosecution of criminal cases is well established. See *United States* v. *Smith*, 331 U.S. 469 (1947); *Ex Parte United States*, 287 U.S. 241 (1932); *Ex Parte United States*, 242 U.S. 27 (1916); *United States* v. *Mayer*, 235 U.S. 55 (1914). The fact that Judge Dooling has not formally filed his memorandum and order does not render the government's application for mandamus premature. See *United States* v. *Mayer*, 235 U.S. 55, 57 (1914); cf. *Will* v. *United States*, 389 U.S. 90, 93 (1967).

We will not pause to determine whether, if Judge Dooling entered his proposed order, the government would be able to appeal his determination under 18 U.S.C. § 3731 (1964). Even if it were clear that the government could not appeal the government's argument for mandamus would not be made more compelling, for mandamus may not do service for an appeal which has been barred by the Congress. *Will* v. *United States*, 389 U.S. 90, 97 (1967). We think it equally true that the fact that the government may have no right of appeal does not act as a conclusive bar to the issuance of mandamus in its favor. Certainly the restrictions placed upon the government's right to appeal do reflect important policy judgments by Congress, at their core protecting the right against double jeopardy, which must not be undermined by casual resort to mandamus. But circumstances can arise which present a compelling need for the issuance of mandamus in order to further important countervailing interests. Here we find this need in our responsibility for preventing gross disruption in the

administration of criminal justice, and we act pursuant to our supervisory power over the district courts. Cf. *United States v. Bryan*, 393 F. 2d 90 (2d Cir. 1968). The Supreme Court, in affirming the issuance of a writ of mandamus by the Court of Appeals for the Seventh Circuit, expressed in the clearest terms its support for the power we now exercise:

> "We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." *La Buy v. Howes Leather Co.*, 352 U. S. 249, 259-60 (1957).

Accordingly, we hold that in the circumstances of this case the fact that the government might not have been able to appeal from Judge Dooling's order does not render mandamus inappropriate. See *United States* v. *Igoe*, 331 F. 2d 766, 769 (7th Cir. 1964). To the extent that the dictum in *United States* v. *Bondy*, 171 F. 2d 642, 643-44 (2d Cir. 1948), suggests a different result we do not adopt it.

We are convinced that it is so highly improper and undesirable for a district judge to take the action which is here proposed by Judge Dooling that we find present the "extraordinary circumstances" which require and justify the exercise of our power to issue the writ of mandamus. For us to acquiesce in this unprecedented action would be to encourage the use of similar procedures by the district courts in the future. Since we believe that the dismissal of an indictment after a verdict of guilty, upon grounds examined and found deficient before trial, is highly deleterious to the sound administration of criminal justice, it is important that we make a clear and unequivocal response to the first example of such a dismissal to come before us. Cf. *Schlagenhauf* v. *Holder*, 379 U. S. 104, 110 (1964).

We are also of the view that the exercise of our man-

damus power is especially appropriate in a case which has already taken a grossly disproportionate amount of trial time in the United States judicial district where the delay in reaching criminal cases for trial is the greatest of any district in the country.[2] See Administrative Office of the United States Courts, Annual Report of the Director—1968, Table D 3b.

We issue the writ of mandamus, and direct the district judge to sentence the defendants and enter judgment on the verdicts of the jury. Judge Dooling remains free to make such further findings as might aid this court in its eventual review of the convictions of these defendants.

Nothing we have said is to be construed as expressing an opinion on the merits of any of the contentions made by a party which may be relevant upon appeals from the convictions.

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[2] In fairness to the district judges it should be pointed out that two unfilled vacancies in the court for a period of two years prior to the summer of 1968 are the principal reason for the delays in criminal trials. Recent efforts of the judges, under Chief Judge Zavatt, including summer sittings by the active and senior judges, and by visiting judges, have greatly reduced the number of pending indictments and the time intervals before trial.

APPENDIX H

Memorandum and Order of Judge Weinstein

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

60 CR 147

UNITED STATES OF AMERICA,

Plaintiff.

—against—

CARMINE PERSICO, JR., SALVATORE ALBANESE, RALPH SPERO, and GEORGE LAFANTE,

Defendants.

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WEINSTEIN, D. J.

This case has been repeatedly tried. The last convictions of defendants was reversed by the Court of Appeals in July, 1965. See *United States* v. *Persico*, 349 F. 2d 6 (2d Cir. 1965). A retrial following that reversal is now scheduled for January of 1968. Defendants move to dismiss on the ground that the long delay and repeated trials have seriously prejudiced them and constitute, in effect, cruel and unusual punishment.

Counsel for defendant LaFante points out that on the last appeal he forcefully argued that there should be no retrial in view of previous delays and retrials and the heavy financial burden of a new trial. This argument was rejected by the Court of Appeals which remanded the case for trial. Counsel now argue that the Court of Appeals was wrong in its decision. This is not a consideration calculated to convince a District Judge.

The delay from July of 1965 to January of 1968 is disturbing. The first six months of it is concededly attributable to the government's indecision. Blame for the remainder of the delay is not clearly assessable. A large part of it was acquiesced in by the defendants and the government when the case repeatedly appeared on the calendar and was adjourned either on consent or without objection. At no time did the defendants make a definite motion for a speedy trial. Their plaint that the Sword of Damocles has been hanging over them for some seven years is not decisive since it could have been removed at any time during the last two and one-half years on their request.

No suggestion is made that since July, 1965, any loss of witnesses or any change in available evidence has made the trial more difficult. If, on the retrial of the case, it should

appear that there was such prejudice, the defendants may renew their motion.

The motion to dismiss is denied with leave to renew it at the trial.

So ordered.

Dated: Brooklyn, New York
December 13, 1967

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U. S. D. J.